Studia canonica 52 | 2018, 5-44
doi: 10.2143/STC.52.1.3285212

SYNODALITY: A CONSTITUTIVE ELEMENT OF THE CHURCH

REFLECTIONS ON POPE FRANCIS AND SYNODALITY

JOHN A. RENKEN*

SUMMARY — Pope Francis teaches that synodality is a constitutive element of the Church, to be found at all levels of church life. This study examines the Pope's reflections on synodality, especially in his 17 October 2015 address on the occasion of the 50th anniversary of the institution of the synod of bishops. It then offers reflections on what synodality does and does not mean.

RÉSUMÉ — Le pape François enseigne que la synodalité est un élément constitutif de l'Église, que l'on retrouve à tous les niveaux de la vie de l'Église. Cette étude examine les réflexions du Pape sur la synodalité, notamment celles qu'il a prononcées dans son discours du 17 octobre 2015 à l'occasion du 50ème anniversaire de l'institution du synode des évêques. L'étude offre ensuite des réflexions sur ce que la synodalité signifie et sur ce qu'elle ne signifie pas.

* Dean, Faculty of Canon Law, Saint Paul University, Ottawa, Ontario, Canada.
This study expands quite significantly a paper delivered on 8 September 2017 during "Journey to 2020: Opening the Conversation to the Plenary Council," arranged by BBI, The Australian Institute of Theological Education, and taking place at Mary MacKillop Place, North Sydney, Australia.
The author is deeply grateful for the tremendous assistance provided by Philip Michael Sauls, tribunal auditor and advocate of the Diocese of Raleigh, in researching, preparing, and editing this study.

Introduction

"Synodality" is a recurring theme for Pope Francis.[1] In various contexts and on multiple occasions, the Holy Father mentions "synodality" in the Church.[2] Simply put, the term refers to the "process of journeying together" or "the process of walking the path with others," in open dialogue as the pilgrim People of God. "Synod" (σύνοδος) comes from two Greek words: σύν (with) and ὁδός (path, road, way).[3] It focuses on the living *journey* of disciples following Jesus (the "Way" – John 14:6) through this world to an eternal Kingdom,[4] a Kingdom whose life is already reflected (albeit

[1] The Pope's emphasis on the synodality of the Church certainly influenced the recently published reflections of the International Theological Commission on this theme. INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," 2 March 2018, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20180302_sinodalita_it.html (20 May 2018).

[2] Cardinal Donald W. Wuerl reflects:

> *[S]ynodality* means coming together – journeying together. This concept seems to be central to Pope Francis' understanding of the nature of the Church, how the Church carried out her mission and who all is engaged in the understanding and articulation of that mission.
>
> Just as Jesus said to his disciples as he prepared to return to his Father in glory, "you will be my witnesses," so Pope Francis is calling the whole body of disciples together in a process of discerning the richness of the proclamation of the faith, accompanying one another as we try to embrace and appropriate the faith, and to announce it to the world today as much by our actions as by our words.
>
> What Pope Francis is doing is helping us all understand that to be true witnesses to Jesus we need to walk together in witnessing and supporting one another. Only in this way can we truly accept the challenge "you will be my witnesses."

See D.W. WUERL, "Pope Francis, Synodality, and *Amoris Laetitia*," in *Origins*, 47 (2017-2018), 296 (= D.W. WUERL, "Pope Francis").

In an interview with Gerard O'Connell on 22 February 2017, Cardinal Donald W. Wuerl says that Pope Francis, in emphasizing synodality (and collegiality) is returning to the "energy of the Second Vatican Council." G. O'CONNELL, "Cardinal Wuerl: Pope Francis Has Reconnected the Church with Vatican II," in *America Magazine*, 6 March 2017, https://www.americamagazine.org/faith/2017/03/06/cardinal-wuerl-pope-francis-has-reconnected-church-vatican-ii (20 May 2018).

Michele Giulio Masciarelli says that synodality is the "idea madre" of the teaching of Pope Francis about the Church and mission. See M.G. MASCIARELLI, *Un popolo sinodale: Camminare insieme*, Todi, Tau Editrice, 2016, 11 (= M.G. MASCIARELLI, *Un popolo sinodale*).

[3] Cardinal Donald W. Wuerl comments that the term *synod* refers to a structure, and the term *synodality* refers to a process. See D.W. WUERL, "Pope Francis," 292.

[4] See INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," nn. 49-53.

imperfectly) in the journey. It expresses that disciples *accompany*[5] each other on the journey to the eternal Kingdom, even as we share in that Kingdom's life in time, here and now: "To journey together is an activity – it is doing something. Synodality is not a static reality but the dynamic interaction of people on a journey together."[6]

The Holy Father elaborates on his reflections on synodality extensively in his 17 October 2015 address during the ceremony commemorating the fiftieth anniversary of the institution of the synod of bishops (hereinafter, "jubilee address").[7] A careful consideration of this jubilee address is enriching for the Church. Significantly, in the jubilee address, Pope Francis explains that synodality, constitutive to the very nature of the Church, is to be experienced in all dimensions and at all levels of the Church. A renewed awareness of, and commitment to, synodality may invite "a pastoral and missionary conversion" of the entire Church, to which the Pope made reference on 24 November 2013 in *Evangelii gaudium*. "I hope that all communities will devote the necessary effort to advancing along the path of a pastoral and missionary conversion which cannot leave things as they presently are. 'Mere administration' can no longer be enough" (*Evangelii gaudium*, 25; see nn. 30, 34). Significantly, in his 6 October 2017 message to the participants of the gathering in Rome of the sixteenth international congress of the *Consociatio Internationalis Studio Iuris Canonici Promovendo*, Pope Francis remarked that "canon law can be a privileged instrument for favouring [Vatican Council II's] reception over time and in the succession of generations," and he added that "synodality in church governance" is one of "the great themes where canon law can also fulfil an educational function, facilitating

[5] See Pope Francis' treatment of "accompaniment" in apostolic exhortation *Evangelii gaudium*, 24 November 2013, in *AAS*, 105 (2013), 1019-1137, nn. 169-173, English translation in https://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html (20 May 2018)

Cardinal Donald W. Wuerl reflects that "accompanying" is an extension of synodality: "Another activity … is accompanying – the pastoral accompaniment of all who seek to find a way closer to God. In many ways, this is an extension of listening and of the synodality to which it gives rise. The journeying together of all the members of the Church implies this accompaniment. But it also calls for a change in pastoral style and intensity." See D.W. Wuerl "Pope Francis: Fresh Perspectives on Synodality," in *CLSAP*, 78 (2016), 13.

[6] J.D. Faris, "Synods, Councils, and Assemblies: Hierarchical Structures as Expressions of Synodality," in *CLSAP*, 78 (2016), 189.

[7] Francis, Address in Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops, 17 October 2015, in *AAS*, 107 (2015), 1138-1144, English translation in *Origins*, 45 (2015-2016), 381-384.

in the Christian people the growth of a feeling and of a culture that responds to Conciliar teaching."[8]

The entire Church hears the prophetic invitation of Pope Francis to advance along this path of conversion, to facilitate the growth of a feeling and culture which reflects the teaching of Vatican II.[9] The Pope invites the Church to become more transparent in all affairs, more actively engaged in the transformation of society, more present to the marginalized who are in the periphery. He inspires us to make the Church a true "sanctuary," where all are safe, where all find refuge from violence and abuse, where all are

[8] FRANCIS, "Message of the Holy Father for the 16th International Congress of the Consociatio Internationalis Studio Iuris Canonici Promovendo," 6 October 2017, http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2017/10/06/171006h.html (20 May 2018).

Similar themes related to which canon law can provide an educational function mentioned by the Holy Father are collegiality; valuing the particular Church; the responsibility of all *christifideles* in the mission of the Church; ecumenism, mercy, and proximity as the primary pastoral principle; personal, collective, and institutional religious freedom; a healthy and positive secularism; and healthy collaboration between the ecclesial and civil community in various expressions.

On the role of canonists in promoting the spirit of synodality in the Church, see Myriam WIJLENS, "Reforming the Church by Hitting the Reset Button: Reconfiguring Collegiality within Synodality because of *Sensus fidei fidelium*," in *The Canonist*, 8 (2017), 238, 250-261 *passim* (=M. WIJLENS, "Reforming the Church").

[9] Alphonse Borras notes three descriptions of the Church over the past half century. (1) THE CHURCH AS THE PEOPLE OF GOD. Vatican II focused on the Church as "the People of God," which emphasizes God as the author of the Church, which is the Body of Christ and the Temple of the Holy Church. This acknowledges the origin of the Church. (2) THE CHURCH AS *COMMUNIO*. Some twenty years later, Pope John Paul II in *Christifidelis laici*, 19, recalled the 1985 Synod of Bishops' statement: "The ecclesiology of *communion is* a central and fundamental concept in the conciliar documents." *Communio* ecclesiology focuses on the nature of the Church which participates in the life of God through diverse charisms, vocations, sensibilities, etc. This acknowledges the organic character of the Church. (3) THE CHURCH AS SYNODAL. More recently, this concept focuses on the process which builds up the Church and emphasizes the participation of the baptized in its mission in the world. This emphasizes the dynamic dimension of the Church. See A. BORRAS,"Évolutions souhaitables en matière de synodalité sur le plan des 'instances intermédiaires'," in L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo: Il Sinodo dei vescovi al servizio di una Chiesa sinodale*, Vatican City, Libreria editrice vaticana, 2016, 263-265 (=L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo*).

See also M. MIELE, *Dalla sinodalità alla collegialità nella codificazione latina*, Diritto Canonico – Diritto eccelsiastico 9, Padua, CEDAM, 2004, 35; G. ROUTHIER, "La synodalité dans l'Église locale," in *Scripta theologica*, 48 (2016), 690, 695; J. SAN JOSÉ PRISCO, "Sinodalidad en la Iglesia particular," in L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo*, 403, see 404-406; M. WIJLENS, "Reforming the Church," 236-237; P. ŽUREK, *Indagine sulla sinodalità. La riflessione cattolica dopo il Concilio Vaticano II con alcuni risvolti ecumenici*, Rome, Pontificia Università Lateranense, 2002, 45-94.

comfortably at home. A practical awareness of, and implementation of, synodality at all levels of Church life will advance us in the conversion about which Pope Francis speaks so constantly and emphatically.

Reflections on synodality would be translated into a new way of thinking, a *novus habitus mentis*,[10] which will be pervasive throughout every level and dimension of the Church. Reflections on synodality respond to the invitation of Pope Francis to missionary disciples "to be bold and creative in this task of rethinking the goals, structures, style, and methods of evangelization in their respective communities" (*Evangelii gaudium*, 33). Properly implementing synodality will enrich, enhance, and enliven the entire People of God.

This study first intends to consider synodality as the Pope presents it in his jubilee address. It then offers reflections on what synodality *does not* mean, and on what synodality *does* mean.

1 — *Jubilee Address of Pope Francis: The 50th Anniversary of Instituting the Synod of Bishops*

On 17 October 2015, during the second phase of the Synod of Bishops on the Family, Pope Francis offered his reflections on synodality at the ceremony commemorating the fiftieth anniversary of the institution of the synod of bishops by Pope Paul VI with his apostolic letter *motu proprio*, *Apostolica sollicitudo*, on 15 September 1965.[11] The jubilee address presents a clear understanding of synodality, which is to be found at all levels of Church life. He begins his remarks by acknowledging that, since Vatican II, "we have experienced ever more intensely the necessity and beauty of 'journeying

[10] See PAUL VI, "Allocutio, Sollemnis dedicatio laborum Commissionis," 20 November 1965, in *Comm*, 1 (1969), 41: "ius canonicum … accommodari debet novo mentis habitu, Concilii Oecumenici Vaticani Secundi proprio, ex quo curae pastorali plutium tribuitur, et novis necessitatibus populi Dei."

See also ID., "Allocutio iis qui in Gregoriana Studiorum Universitate 'Cursui renovationis canonicae pro iudicibus aliisque tribunalium administris, interfuerunt," 14 December 1973, in *AAS*, 66 (1974), 10; ID., "Ad Tribunalis Sacrae Romanae Rotae Decanum, Praelatos Auditores, Officiales, et Advocatos, novo litibus iudicandis ineunte anno, de protectione iustitiae perfectiore reddenda," 4 February 1977, in *AAS*, 69 (1977), 153.

[11] PAUL VI, apostolic letter *motu proprio Apostolica sollicitudo*, 15 September 1965, in *AAS*, 57 (1965), 775-780, English translation in *CLD*, vol. 6, 388-393.

For background on the development of the synod of bishops, see M. GRONCHI, "Evoluzione del Sinodo dei Vescovi," in *Apollinaris*, 88 (2015), 617-630.

together'."[12] Then, he highlights various aspects of synodality, "the process of journeying together," as the Church. Below is a thematic rendering of ten aspects of synodality drawn from Pope Francis in his jubilee address (identified and arranged by this writer).

1.1 — Synodality is a constitutive element of the Church

Pope Francis says that synodality is "a constitutive element of the Church,"[13] in which everyone is "journeying together."[14] Synodality provides the fundamental and pervasive hermeneutic within which hierarchical ministry is understood. Indeed, hierarchical ministry involves a "lowering" of self to serve others on the journey. He says:

> *Synodality*, as a constitutive element of the Church, offers us the most appropriate interpretive framework for understanding the hierarchical ministry itself. If we understand, as Saint John Chrysostom says, that "Church and Synod are synonymous" [SAINT JOHN CHRYSOSTOM, *Explicatio in Ps. 149*, *PG* 55, 493], inasmuch as the Church is nothing other than the "journeying together" of God's flock along the paths of history towards the encounter with Christ the Lord, then we understand too that, within the Church, no one

[12] "Journeying together" is rendered in the various languages: *camminare insieme, cheminer ensemble, caminar juntos, caminhar juntos*. See FRANCIS, "Jubilee address" in the various languages: http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2015/10/17/0794/01750.html#ingl et al. (20 May 2018).

[13] Pope Francis explains the fundamental nature of the Church in *Evangelii gaudium*, 111: "The Church, as the agent of evangelization, is more than an organic and hierarchical institution; she is first and foremost a people advancing on its pilgrim way towards God."

Cardinal Lorenzo Baldisseri, general secretary of the synod of bishops, comments that Pope Francis envisions that synodality is "diffuse" – that is, it permeates every dimension of the Church: "Papa Francesco pensa, in un certo senso, a una sinodalità 'diffusa,' in grado di permeare ogni ambito della missione ecclesiale, nella consapevolezza che la sinodalità è una dimensione costitutiva della Chiesa stessa." L. BALDISSERI, "L'altro nome della Chiesa: Sinodalità e popolo di Dio," in *L'Osservatore Romano*, 13 December 2016, http://www.osservatoreromano.va/it/news/sinodalita-e-popolo-di-dio-laltro-nome-della-chies (20 May 2018).

Myriam Wijlens comments: "The Pope does not emphasize the hierarchical structure as constitutive, but rather synodality which is the framework for hierarchical authority as service." M. WIJLENS, "Reforming the Church," 236.

[14] See FRANCIS, *Evangelii gaudium*, 113. Pope Francis stresses that salvation involves being in communion (i.e., walking together with others) by the very design of God: "The salvation which God has wrought, and the Church joyfully proclaims, is for everyone. God has found a way to unite himself to every human being in every age. He has chosen to call them together as a people and not as isolated individuals. No one is saved by himself or herself, individually, or by his or her own efforts. God attracts us by taking into account the complex interweaving of personal relationships entailed in the life of a human community."

can be "raised up" higher than others. On the contrary, in the Church, it is necessary that each person "lower" himself or herself, so as to serve our brothers and sisters along the way.[15]

1.2 — Synodality reveals ministry as service

Constituted as synodal, the Church is likened to an inverted pyramid, the top being beneath the base.[16] Ministers (i.e., those who are "the least of all")

[15] Joseph A. Komonchak reflects about synodality as a constitutive element of the Church. "All of them, singly and together, are *synodoi*, travel-companions, in hope walking the same road toward the same homeland. Before it describes a task to be undertaken at some second moment, what is called "synodality" defines a constitutive dimension of the Church. It is one of the many names for the fellowship of believers. And, not least of all, a concretely focused ecclesiology will not neglect that, as Pope Francis recently reminded us, the vast majority of those of whom and in whom statements about the Church must be verified are lay people (cf. *EG* 102). No ecclesiology should ever overlook this most obvious of all facts about the Church: ninety-nine percent of these Christian *synodoi* are lay people. What does synodality mean and require if we keep this constantly in mind?" J.A. KOMONCHAK, "Theological Perspectives on the Exercise of Synodality," in L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo*, 352-353.

See also M.G. MASCIARELLI, *Un popolo sinodale*, 15-16; and D. VITALI, "I soggetti della sinodalità alla luce dell'ecclesiologia del Concilio Vaticano II," in L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo*, 169-172.

[16] If the pyramid is not inverted, there is not synodality in the Church. In an interview with Pope Francis for *Tertio*, the Belgian Catholic weekly, at the end of the extraordinary Jubilee Year of Mercy, the Holy Father contrasts a pyramidal Church and the synodal Church.

> The "Synodal Church," let me take this word. The Church is born from the community, it is born from the foundation, it is born from Baptism, and it is organised around a bishop, who brings it together and gives it strength; the bishop who is the successor of the Apostles. This is the Church. But in all the world there are many bishops, many organised Churches, and there is Peter. Therefore, either there is a pyramidal Church, in which what Peter says is done, or there is a synodal Church, in which Peter is Peter but he accompanies the Church, he lets her grow, he listens to her, he learns from this reality and goes about harmonising it, discerning what comes from the Church and restoring it to her. …
>
> Do not descend from high to low, but listen to the Churches, harmonise them, discern. And so there is a post-Synodal exhortation, which is *Amoris Laetitia*, which is the result of two Synods, in which all the Church worked, and which the Pope made his own. It is expressed in a harmonious way. It is interesting that all that it [*Amoris Laetitia*] contains, in the Synod it was approved by more than two thirds of the fathers. And this is a guarantee. A synodal Church means that there is this movement from high to low, high to love. And the same in the dioceses. But there is a Latin phrase, that says that the Churches are always *cum Petro et sub Petro*. Peter is the guarantor of the unity of the Church. He is the guarantor.

exercise an authority of service; their power is the power of the cross. The Pope explains:

> Jesus founded the Church by setting at her head the Apostolic College, in which the Apostle Peter is the "rock" (cf. *Mt* 16:18), the one who must confirm his brethren in the faith (cf. *Lk* 22:32). But in this Church, as in an inverted pyramid, the top is located beneath the base. Consequently, those who exercise authority are called "ministers," because, in the original meaning of the word, they are the least of all. It is in serving the people of God that each bishop becomes, for that portion of the flock entrusted to him, *vicarius Christi* [VATICAN COUNCIL II, *Lumen gentium*, 27], the vicar of that Jesus who at the Last Supper bent down to wash the feet of the Apostles (cf. *Jn* 13:1-15). And in a similar perspective, the Successor of Peter is nothing else if not the *servus servorum Dei* [POPE FRANCIS, Address to the Third Extraordinary Assembly of the Synod of Bishops, 18 October 2014].
>
> Let us never forget this! For the disciples of Jesus, yesterday, today, and always, the only authority is the authority of service, the only power is the power of the cross. As the Master tells us: "You know that the rulers of the Gentiles lord it over them, and their great men exercise authority over them. It shall not be so among you; but whoever would be great among you must be your servant, and whoever would be first among you must be your slave" (*Mt* 20:25-27). *It shall not be so among you*: in this expression we touch the heart of the mystery of the Church, and we receive the enlightenment necessary to understand our hierarchical service.[17]

Some may sense that synodality "turns things upside down." It reveals that church leaders are not mere overseers but true servants who "walk the talk." Some systemic change is required for synodality to work.

> This is the meaning. And it is necessary to progress in synodality, which is one of the things that the Orthodox have conserved. And also the Oriental Catholic Churches. It is a richness of theirs, and I recognise it in the Encyclical.

"Interview with the Holy Father Francis for the Belgian Catholic Weekly *Tertio*," 7 December 2016, http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2016/12/07/161207a.html (20 May 2018).

See also T.J. GREEN, "The Legislative Competency of the Episcopal Conference: Present Situation and Future Possibilities in Light of the Eastern Synodal Experience," in *The Jurist*, 64 (2004), 284-331.

[17] The so-called 2007 "Ravenna Document," which offers significant reflection on synodality, also stresses that authority in the Church must be a service of love. JOINT INTERNATIONAL COMMISSION FOR THE THEOLOGICAL DIALOGUE BETWEEN THE ROMAN CATHOLIC CHURCH AND THE ORTHODOX CHURCH, "Ecclesiological and Canonical Consequences of the Sacramental Nature of the Church: Ecclesial Communion, Conciliarity, and Authority," Ravenna, 13 October 2007, http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/ch_orthodox_docs/rc_pc_chrstuni_doc_20071013_documento-ravenna_en.html (20 May 2018).

1.3 — Synodality involves all the People of God

Pope Francis acknowledges that the entire Church participates in the process of synodality.[18] All the baptized are anointed and cannot err in matters of belief.[19] The *sensus fidei*[20] prevents a rigid separation between a "teaching

[18] Alphonse Borras comments that "synodality" describes the Church, and that "coresponsibility" pertains to its members. "Coresponsibilité et synodalité seraient comme les deux facettes de la vie ecclésiale. Celle-ci implique que l'on se mette à l'écoute de tous pour discerner ce que l'Esprit dit aux Églises. La coresponsabilité est le fait d'une Église de *sujets* (…), le synodalité celui de l'Église-*sujet*. En ce sens, la synodalité est à proprement parler une propriété de la communion ecclésiale." See A. BORRAS, "Trois expressions de la synodalité depuis Vatican II," in *Ephemerides theologicae lovanienses*, 90 (2014), 644, 648-650.

Myriam Wijlens suggests that the Pope's emphasis on the common synodality of *all* the faithful reflects a "new configuration," rooted in different doctrines of Vatican Council II.

> Synodality is not any longer exclusively the doctrine of collegiality of the bishops with the Pope, but it allows for and requires a participation of all the faithful in discernment and thus decision-making processes. The new configuration is rooted in different doctrines of Vatican II, such as the doctrine that the church is the People of God, that all baptized participate in the threefold ministry of Christ – and related to this is the doctrine on the charisms, the doctrine that the church as such cannot err, the doctrine concerning the collegiality of bishops and with it the relationship to the primacy of the Pope. It should be stated upfront: Pope Francis did not change any of these doctrines of Vatican II in themselves, but by placing each of them into a new relationship with each other he was able to transform the totality. In doing so he offered a new perspective in the familiar. He showed in words and deeds how the doctrines that hitherto stood side by side, unfold their deeper meaning when they are considered as mutually complementary. Not a change of doctrine, but a new understanding of the individual doctrines was made possible by looking at them as standing in an organic unity. The new configuration is ultimately not directed to decision making processes as such, but towards the higher purpose of the church and the internal ordering, namely, to proclaim the faith in Jesus Christ faithfully and effectively to the current people in their specific circumstances of life, so that it may more and more fill the hearts of people (*DV* 26).…
>
> The reconfiguration will and should have impact on all levels of discernment and decision- making processes in the church whether they take place in the local church, that is the parish and the diocese, in groupings of local churches such as ecclesiastical provinces or the churches gathered through their bishops in an episcopal conference, or in the church universal. M. WIJLENS, "Reforming the Church," 236-237. See INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," nn. 8-10.

[19] See D.W. WUERL, "Pope Francis," 294.

[20] The INTERNATIONAL THEOLOGICAL COMMISSION clearly distinguishes the *sensus fidei* from public or majority opinion: "It is undoubtedly necessary to distinguish between the *sensus fidei* and public or majority opinion, hence the need to identify dispositions necessary for participation in the *sensus fidei*, such as those elaborated above. Nevertheless, it is the whole people of God which, in its inner unity, confesses and lives the true faith. The magisterium and theology must work constantly to renew the presentation of the faith in different

Church" (*Ecclesia docens*) and a "learning Church" (*Ecclesia discens*).[21] He reflects:

> After stating that the people of God is comprised of all the baptized who are called to "be a spiritual house and a holy priesthood" [VATICAN COUNCIL II, *Lumen gentium*, 10], the Second Vatican Council went on to say that "the whole body of the faithful, who have an anointing which comes from the holy one (cf. 1 *Jn* 2:20, 27), cannot err in matters of belief. This characteristic is shown in the supernatural sense of the faith (*sensus fidei*) of the whole people of God, when 'from the bishops to the last of the faithful' it manifests a universal consensus in matters of faith and morals" [VATICAN COUNCIL II, *Lumen gentium*, 12]. These are the famous words *infallible "in credendo."*
>
> In the Apostolic Exhortation *Evangelii gaudium*, I emphasized that "the people of God is holy thanks to this anointing, which makes it infallible *in credendo*," [FRANCIS, *Evangelii gaudium*, 119] and added that "all the baptized, whatever their position in the Church or their level of instruction in the faith, are agents of evangelization, and it would be insufficient to envisage a plan of evangelization to be carried out by professionals while the rest of the faithful would simply be passive recipients" [*Ibid*., 120]. The *sensus fidei* prevents a rigid separation between an

situations, confronting if necessary dominant notions of Christian truth with the actual truth of the Gospel, but it must be recalled that the experience of the Church shows that sometimes the truth of the faith has been conserved not by the efforts of theologians or the teaching of the majority of bishops but in the hearts of believers." INTERNATIONAL THEOLOGICAL COMMISSION, "*Sensus fidei* in the Life of the Church," June 2014, in *Origins*, 44 (2014-2015), 133-155, n. 119.

For further reflections on the *sensus fidei*, particularly as it leads to a *consensus fidelium*, see O. RUSH, "The Church Local and Universal and the Communion of the Faithful," in C.D. DENNY, P.J. HAYES, and N.K. RADEMACHER (eds.), *A Realist's Church: Essays in Honor of Joseph A. Komonchak*, Maryknoll, New York, Orbis Books, 2015, 117-130; ID., "A Synodal Church: On Being a Hermeneutical Community," in A.J. GODZIEBA and B.E. HINZE (eds.), *Beyond Dogmatism and Innocence: Hermeneutics, Critique, and Catholic Theology*, Collegeville, The Liturgical Press, 2017, 160-178; M.G. MASCIARELLI, *Un popolo sinodale*, 59-83; M. WIJLENS, "Reforming the Church," 244-247.

[21] José R. Villar comments: "Como es sabido, la teología y praxis católica de los últimos siglos acentuaba la distinción entre pastores y fieles, como reacción ante al pensamiento protestante, y su afirmación de una igualidad indistincta de todos los bautizados. Se explica así la escasa referencia, en la teología y en el magisterio previo al Concilio Vaticano II, a la idea de común vocación cristiana. Al tensar la diferencia entre cleros y laicos, era inevitable ofrecer una imagen de la Iglesia como institución piramidal dividida en sectores: la *ecclesia docens*, depositaria de las funciones y de la autoridad, y la *ecclesia discens*, formada por súbidos subordinados al clero, sobre el que recaería la titularidad de la misión, y al que los simples bautizados podían 'auxiliar,' pero sin una responsabilidad propria." J.R. VILLAR "La sinodalidad en la reflexión teológica actual," in *Ius canonicum*, 58 (2018), 3-4.

> *Ecclesia docens* and an *Ecclesia discens*, since the flock likewise has an instinctive ability to discern the new ways that the Lord is revealing to the Church [FRANCIS, Address to the Leadership of the Episcopal Conferences of Latin America during the General Coordination Meeting, Rio de Janeiro, 28 July 2013, 5. 4; ID., Address on the Occasion of a Meeting with Clergy, Consecrated Persons, and Members of Pastoral Councils, Assisi, 4 October 2013].

Pope Francis adds that, because synodality involves the whole People of God, he chose to consult them in preparation for both phases of the synod on the family:

> Such was the conviction underlying my desire that the people of God should be consulted in the preparation of the two phases of the Synod on the family, as is ordinarily done with each *Lineamenta*. Certainly, a consultation of this sort would never be sufficient to perceive the *sensus fidei*. But how could we speak about the family without engaging families themselves, listening to their joys and their hopes, their sorrows and their anguish [VATICAN COUNCIL II, *Gaudium et spes*, 1]? Through the answers given to the two questionnaires sent to the particular Churches, we had the opportunity at least to hear some of those families speak to issues which closely affect them and about which they have much to say.

1.4 — Synodality requires mutual listening

The synodal Church expects mutual listening,[22] whereby everyone learns.[23] Indeed, the synod of bishops occasions a bringing together

[22] Pope Francis himself referred to this comment about mutual listening from his synodal address in his 2017 Christmas greetings to the Roman Curia. See Christmas Greetings of Pope Francis to the Roman Curia, 21 December 2017, http://w2.vatican.va/content/francesco/en/speeches/2017/december/documents/papa-francesco_20171221_curia-romana.html (20 May 2018).

[23] Cardinal Blase Cupich, present at the jubilee address of Pope Francis, reflects on the listening which is essential to synodality.

> As we came to the midpoint in the synod process, Pope Francis gathered us together on Oct. 17 to celebrate the 50th anniversary of synods. On that occasion he asked the bishops to keep in mind that not only do we need to listen to one another, but we also have to be leaders who listen to those we serve. As he put it, we have to be both an ecclesia docens (a teaching church) and ecclesia discens (a learning or listening church).
>
> Applying his direction to our work in the synod, the pope was telling us that as we relate to those we serve, not only are we teachers but learners and listeners.
>
> Having taught for many years at all levels of education, I know I always come away from my interactions with students having learned more than I taught. Perhaps those of you who have been teachers know what I mean. Students do push teachers to rethink, reformulate, and reframe the information they are conveying, so that it is not

of what is heard at all levels of the Church's life.[24] Pope Francis elaborates:

> A synodal Church is a Church which listens, which realizes that listening "is more than simply hearing" [FRANCIS, *Evangelii Gaudium*, 171]. It is a mutual listening in which everyone has something to learn. The faithful people, the college of bishops, the Bishop of Rome: all listening to each other, and all listening to the Holy Spirit, the "Spirit of truth" (*Jn* 14:17), in order to know what he "says to the Churches" (*Rev* 2:7).

The Pope illustrates how the synod of bishops is the "point of convergence" of the process of mutual listening at all levels of the Church. He insists that, in the synodal process which involves mutual listening, the Petrine office is the guarantee of ecclesial unity:[25]

> The Synod of Bishops is the point of convergence of this listening process conducted at every level of the Church's life. The Synod process begins by

only understandable, but also responsive to the questions and life experiences of students. The same has to be the case for leaders in the church. We do have a responsibility to teach, but also to listen and learn, so that we can benefit from the wisdom of those we serve.

At the same time, this kind of listening to each other is about more than being attentive to the thoughts, convictions, and opinions of other people. Rather, we listen to each other to discern where God is leading the church. Because of our faith that the Holy Spirit is at work in the church, in listening to each other, we are also listening to the Lord who works in us and through us. As a result, in addition to being an ecclesia docens (a teaching church) and an ecclesia discens (a learning church), as Pope Francis tells us, we are also an ecclesia discernens (a discerning church). B. CUPICH, "Synodality: Pope Francis Calls for a New Way of Being Church," in *Chicago Catholic*, 15 November 2015, www.chicagocatholic.com/column/archbishop-cupich/2015/11/15/synodality-pope-francis-calls-for-a-new-way-of-being-church (15 June 2018).

See also D.W. WUERL, "Pope Francis: Fresh Perspectives on Synodality," 13; W. NAPIER, OFM, "What Made Synod 2014 and 2015 So Interesting? Collegiality and Synodality!" in *The Jurist*, 76 (2016), 327-338.

[24] The so-called 2016 Chieti document, which addresses synodality and the primacy during the first millennium, comments that synodality "broadly" refers to the involvement of everyone in the Church's activity: "Synodality is a fundamental quality of the Church as a whole. As St John Chrysostom said: "'Church' means both gathering [*systema*] and synod [*synodos*]" [ST. JOHN CHRYSOSTOM, *Explicatio in Ps 49*, *PG* 55, 493]. The term comes from the word "council" (*synodos* in Greek, *concilium* in Latin), which primarily denotes a gathering of bishops, under the guidance of the Holy Spirit, for common deliberation and action in caring for the Church. Broadly, it refers to the active participation of all the faithful in the life and mission of the Church." JOINT INTERNATIONAL COMMISSION FOR THE THEOLOGICAL DIALOGUE BETWEEN THE ROMAN CATHOLIC CHURCH AND THE ORTHODOX CHURCH, "Synodality and Primacy during the First Millennium: Towards a Common Understanding in Service of the Unity of the Church," Chieti, 21 September 2016, n. 3, in *Origins*, 46 (2016-2017), 328-330.

[25] The synod of bishops offers its consultative vote, but the Roman Pontiff can endow it with a deliberative vote, in which case the Pope ratifies its conclusions (PAUL VI, *Apostolica*

listening to the people of God, which "shares also in Christ's prophetic office" [VATICAN COUNCIL II, *Lumen gentium*, 12], according to a principle dear to the Church of the first millennium: "*Quod omnes tangit ab omnibus tractari debet*." The Synod process then continues by listening to the pastors. Through the Synod Fathers, the bishops act as authentic guardians, interpreters, and witnesses of the faith of the whole Church, which they need to discern carefully from the changing currents of public opinion. On the eve of last year's Synod I stated: "For the Synod Fathers we ask the Holy Spirit first of all for the gift of listening: to listen to God, so that with him we may hear the cry of his people; to listen to his people until we are in harmony with the will to which God calls us" [FRANCIS, Address at the Prayer Vigil for the Synod of the Family, 4 October 2014]. The Synod process culminates in listening to the Bishop of Rome, who is called to speak as "pastor and teacher of all Christians" [VATICAN COUNCIL I, *Pastor aeternus* (18 July 1870), ch. IV: DENZ. 3074. Cf. *CIC*, c. 749 § 1], not on the basis of his personal convictions but as the supreme witness to the *fides totius Ecclesiae*, "the guarantor of the obedience and the conformity of the Church to the will of God, to the Gospel of Christ, and to the Tradition of the Church" [FRANCIS, Address to the Third Extraordinary General Assembly of the Synod of Bishops, 18 October 2014].

The fact that the Synod always acts *cum Petro et sub Petro* — indeed, not only *cum Petro*, but also *sub Petro* — is not a limitation of freedom, but a guarantee of unity. For the Pope is, by will of the Lord, "the perpetual and visible source and foundation of the unity both of the bishops and of the whole company of the faithful" [VATICAN COUNCIL II, *Lumen gentium*, 23; cf. Vatican Council I, *Pastor aeternus*, Prologue: DENZ. 3051]. Closely related to this is the concept of "*hierarchica communio*" as employed by the Second Vatican Council: the Bishops are linked to the Bishop of Rome by the bond of episcopal communion (*cum Petro*) while, at the same time, hierarchically subject to him as head of the college (*sub Petro*) [cf. VATICAN COUNCIL II, *Lumen gentium*, 22; *Christus Dominus*, 4].

1.5 — Synodality is easy to express, but not so easy to implement

The invitation to synodality comes from God, but the Pope acknowledges that putting synodality into practice can be challenging. "What the Lord is asking of us is already in some sense present in the very word 'synod.' Journeying together – laity, pastors, the Bishop of Rome – is an easy concept to put into words, but not so easy to put into practice." In simple terms, "synodality" is easier said than done.

sollicitudo, II; c. 343). The Roman Pontiff guarantees ecclesial unity, a function proper to the Petrine office, whether the synod of bishops offers a consultative vote or a deliberative vote which the Pope must confirm.

1.6 — Synodality is to be found at all levels of the Church

Pope Francis explains that "[i]n a synodal Church, the Synod of Bishops is only the most evident manifestation of a dynamism of communion which inspires all ecclesial decisions." In addition to the synod of bishops where synodality is so evident, he continues, the exercise of synodality is to be found at all levels of the Church: the local, the regional, and the universal.[26]

The local level. Synodality is found most immediately in the "organs of communion" of the particular Churches. To be effective, these organs must remain connected to the grass roots, the "base." The Pope says:

> The first level of the exercise of *synodality* is had in the particular Churches. After mentioning the noble institution of the Diocesan Synod, in which priests and laity are called to cooperate with the bishop for the good of the whole ecclesial community [*CIC*, cc. 460-468], the *Code of Canon Law* devotes ample space to what are usually called "organs of communion" in the local Church: the presbyteral council, the college of consultors, chapters of canons, and the pastoral council [*CIC*, cc. 495-514].[27] Only to the extent that these organizations keep connected to the "base" and start from people and their daily problems, can a synodal Church begin to take shape: these means, even when they prove wearisome, must be valued as an opportunity for listening and sharing.

The regional level. Synodality also exists at the supra-diocesan level in ecclesiastical provinces, ecclesiastical regions, particular councils and episcopal conferences.[28] Because this is true, Pope Francis teaches that the pope

[26] The "Ravenna Document" had addressed "conciliarity or synodality" and had explained that this concept pertains, properly and comprehensively, to the entire Church, all its members: see nn. 5, 10, 20-21. See also M.G. MASCIARELLI, *Un popolo sinodale*, 13-14.

[27] In *Evangelii gaudium*, 31, Pope Francis made reference to these same canons, stating that they contain "means of participation" (not "organs of communion," the term used in his jubilee address on 17 October 2015): "The bishop must always foster this missionary communion in his diocesan Church…. In his mission of fostering a dynamic, open, and missionary communion, he will have to encourage and develop the means of participation proposed in the Code of Canon Law [cf. canons 460-468; 492-502; 511-514; 536-537], and other forms of pastoral dialogue, out of a desire to listen to everyone and not simply to those who would tell him what he would like to hear."

For reflections on the exercise of synodality in the diocesan synod, the diocesan pastoral council, and the synod of bishops, see A. BORRAS, "Trois expressions de la synodalité depuis Vatican II," 643-666; ID., "Évolutions souhaitables en matière de synodalité sur le plan des 'instances intermédiaires'," 273-284; J. SAN JOSÉ PRISCO, "Sinodalidad en la Iglesia particular," 403-412.

[28] See the remarks of M.Á. FLORES RAMOS during the 103rd plenary assembly of the Conferencia del Episcopado Mexicano on 25 April 2017, "Sinodalidad en las Conferencias

is not to replace the local bishops in discerning every local issue. He wishes to promote a sound "decentralization." He comments:

> The second level is that of Ecclesiastical Provinces and Ecclesiastical Regions, Particular Councils, and, in a special way, Conferences of Bishops [*CIC*, cc. 431-459]. We need to reflect on how better to bring about, through these bodies, intermediary instances of *collegiality*, perhaps by integrating and updating certain aspects of the ancient ecclesiastical organization. The hope expressed by the Council that such bodies would help increase the spirit of episcopal *collegiality* has not yet been fully realized. We are still on the way, part-way there. In a synodal Church, as I have said, "it is not advisable for the Pope to take the place of local Bishops in the discernment of every issue which arises in their territory. In this sense, I am conscious of the need to promote a sound 'decentralization'" [FRANCIS, *Evangelii gaudium*, 16; cf. 32].

The universal level. Finally, synodality exists at the level of the universal Church, where the synod of bishops expresses "episcopal collegiality within an entirely synodal church."[29] Pope Francis explains:

> The last level is that of the universal Church. Here the Synod of Bishops, representing the Catholic episcopate, becomes an expression of *episcopal*

Episcopales a la luz de la eclesiología del Pueblo de Dios del Vaticano II," http://inspiramedios.org/articulo.php?articulo=39 (20 May 2018).

[29] While discussing the synod of bishops, Cardinal Donald W. Wuerl succinctly relates "collegiality" to "synodality": "Collegiality refers to the Successor of Peter governing the Church in collaboration with, and with the participation of, the bishops of the local churches, respecting their joint responsibility for the Universal Church. Synodality is one particular expression of that rightful participation of the local churches in governance, through consultation.… Ecclesiologically, what Pope Francis has done is to refocus, once again, on the ministry of the College of Bishops as was the case in the Second Vatican Council in *Lumen gentium*." D.W. WUERL, "Pope Francis: Fresh Perspectives on Synodality," 5, 9.

Myriam Wijlens says that Pope Francis places the exercise of the doctrine of collegiality within the context of synodality. M. WIJLENS, "Reforming the Church," 250, see 251-258,

Michele Giulio Masciarelli explains the distinction between "collegiality" and "synodality" and he also reflects upon their interrelation:

> Tuttavia la collegialità non è la sinodalità e questa non è la collegialità: la prima riguarda i vescovi, la seconda tutta la Chiesa. Si può dire però che la collegialità è anche sinodale e la sinodalità è anche collegiale: la collegialità è una forma basilare e causale di sinodalità, mentre la sinodalità è un'expansione della communion che si dirama oltre il corpo episcopale per intridere del suo mistero altri corpi: il corpo presbyterale, il corpo "religioso," il corpo "laicale," in una parola, il corpo della Chiesa intera.…
>
> Francesco … chiede di passare dalla collegialità alla sinodalità, che non significa sostituire la collegialità con la sinodalità, ma espandere nella sinodalità la realità della communion che è già dall'inizio sinodale ed ha origine nell'eternità della vita trinitaria, che sostanzia e anima la collegialità storica di pastori, ma che non si esaurisce in essa. Espandere i dinamismi di comunione aiuterà, di fatto, a superare anzitutto il limite ora

collegiality within an entirely synodal Church [VATICAN COUNCIL II, *Christus Dominus*, 5; *CIC*, cc. 342-348]. Two different phrases: "episcopal collegiality" and an "entirely synodal Church." This level manifests the *collegialitas affectiva*, which can also become in certain circumstances "effective," joining the Bishops among themselves and with the Pope in solicitude for the People God [cf. SAINT JOHN PAUL II, *Pastores gregis*, 8].[30]

ricordato, che è quello d'aver insistito in modo esplicito quasi unicamente sulla traduzione collegiale del principio della communion: la collegialità non è tutta la communione di cui la Chiesa è capace e di cui ha bisogna. M.G. MASCIARELLI, *Un popolo sinodale*, 17, 56; see also 158-159.

Catherine Clifford explains: "synodality is actually a broader concept than collegiality. It entails a synergy of the gifts of all the baptised and it means that at every level of church life we have structures for dialogue and participation for all the baptised to make their needs known, share their gifts and put them at the service of the church. That way we are always in the process of discerning what the Gospel is requiring of us in each context and each new time." C. CLIFFORD, Interview on 21st Century Ecumenism at BBI. The Australian Institute of Theological Education, 3 November 2014 at: http://www.bbi.catholic.edu.au/news-events/110/article/1369/21st-century-ecumenism (20 May 2018).

See also INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," n. 64; M. FAGGIOLI, "Institutions of Episcopal Synodality-Collegiality after Vatican II: The Decree *Christus Dominus* and the Agenda for Collegiality-Synodality in the 21st Century," in *The Jurist*, 64 (2004), 224-246; É. KOUVEGLO, "Il Sinodo dei Vescovi nella vita e nel diritto della Chiesa. Tra 'collegialità' e 'sinodalità,'" in *Apollinaris*, 88 (2015), 631-658; G. INCITTI, "Prospettive giuridiche sull'esercizio della sinodalità," in L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo*, 370-371.

30 During his Christmas greetings to the Roman Curia on 22 December 2016, Pope Francis explained that synodality is one of the principles guiding the reform of the curia: "The work of the Curia must be synodal, with regular meetings of Heads of the Dicasteries, presided over by the Roman Pontiff; regularly scheduled Audiences of Heads of the Dicasteries with the Pope, and the customary interdicasterial meetings. The reduced number of Dicasteries will allow for more frequent and systematic meetings of individual Prefects with the Pope and productive meetings of Heads of Dicasteries, since this cannot be the case when groups are too large. Synodality must also be evident in the work of each Dicastery, with particular attention to the Congress and at least a greater frequency of the Ordinary Sessions. Each Dicastery must avoid the fragmentation caused by factors such as the multiplication of specialized sectors, which can tend to become self-absorbed. Their coordination must be the task of the Secretary, or the Undersecretary." FRANCIS, "Presentation of Christmas Greetings to the Roman Curia," 22 December 2016, https://w2.vatican.va/content/francesco/en/speeches/2016/december/documents/papa-francesco_20161222_curia-romana.html (20 May 2018).

About a week earlier, on 14 December 2016, at the end of the meeting of the Council of Cardinals ("the C9"), Greg Burke, the director of the Sala Stampa, reported that the Council had identified two guidelines for curial reform: missionary impulse and synodality. G. BURKE, "Briefing on the Seventeenth Meeting of the Council of Cardinals," 14 December 2016, http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2016/12/14/161214c.html (20 May 2018).

1.7 — Synodality has significant ecumenical implications

Pope Francis believes that a careful examination of synodality will be a great contribution to ecumenical relations[31] with the Orthodox, something he had mentioned a few months earlier to a delegation from the Ecumenical Patriarch of Constantinople. He states in his jubilee address:

> The commitment to build a synodal Church – a mission to which we are all called, each with the role entrusted him by the Lord – has significant ecumenical implications. For this reason, speaking recently to a delegation from the Patriarchate of Constantinople, I reaffirmed my conviction that "a careful examination of how, in the Church's life, the principle of synodality and the service of the one who presides are articulated, will make a significant contribution to the progress of relations between our Churches" [FRANCIS, Address to the Delegation of the Ecumenical Patriarch of Constantinople, 27 June 2015[32]].

[31] See INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," nn. 115-117.

[32] Pope Francis had stated that attaining "full, visible communion between the Orthodox and Catholics" is a "goal, towards which we have set out together in trust [which] represents one of my main concerns for which I do not cease to pray to God." He expressed his support for the Orthodox-Catholic dialogue conducted by the Joint International Commission for Theological Dialogue between the Catholic Church and the Orthodox Church, and called for a "careful examination" of synodality: "The careful examination of how in the Church the principle of synodality and the service of the one who presides are articulated, will make a significant contribution to the progress of relations between our Churches." See FRANCIS, Address to the Delegation of the Ecumenical Patriarchate of Constantinople, 27 June 2015, http://w2.vatican.va/content/francesco/en/speeches/2015/june/documents/papa-francesco_20150627_patriarcato-costantinopoli.html (20 May 2018).

More recently, on 30 November 2017, the Feast of Saint Andrew, in a message to Bartholomew I, Patriarch of Constantinople and Ecumenical Patriarch, Pope Francis encouraged further theological dialogue between Catholics and Orthodox and acknowledged the consensus reached on the relationship between primacy and synodality. He suggested that perhaps further reflection could lead to a common understanding of the Petrine ministry in the context of synodality at the present time: "The consensus reached by Catholics and Orthodox on certain fundamental theological principles regulating the relationship between primacy and synodality in the life of the Church in the first millennium can serve to evaluate, even critically, some theological categories and practices which evolved during the second millennium in conformity with those principles. Such consensus may enable us to envisage a common way of understanding the exercise of the ministry of the Bishop of Rome, in the context of synodality and at the service of the communion of the Church in the present context. This sensitive task needs to be pursued in an atmosphere of mutual openness and, above all, in obedience to the demands that the Holy Spirit makes of the Church." FRANCIS, Message to His Holiness Bartholomew I, Patriarch of Constantinople and Ecumenical Patriarch for the Feast of Saint Andrew, 30 November 2017, http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2017/11/30/0847/01832.html (20 May 2018).

Indeed, over two years before his jubilee address, the Pope had mentioned that Catholics can learn much from the Orthodox concerning the practical exercise of synodality.[33]

[33] On 28 June 2013, during an audience with the delegation of the Ecumenical Patriarch of Constantinople, Pope Francis acknowledged the "essential contribution to the search for full communion between Catholics and Orthodox … offered by the Mixed International Commission for Theological Dialogue" which at the time "is now studying the delicate theme of the theological and ecclesiological relationship between primacy and synodality in the Church's life." He says that Catholics can learn about the tradition of synodality from the Orthodox: "It is significant that today we are able to reflect together on these areas in truth and love, beginning from what we have in common, yet without concealing what still divides us. This is no mere theoretical exercise: it demands in-depth knowledge of one another's traditions in order to understand them and sometimes also to learn from them. I am speaking for example of Catholic Church's reflection on the meaning of episcopal collegiality and the tradition of synodality, so characteristic of the Orthodox Churches. I am confident that the effort to reflect together, complex and laborious though it is, will bear fruit in due course." FRANCIS, "Udienza alla delegazione del Patriarcato ecumenico di Constantinopoli in occasione della Solennità dei Santi Apostoli Pietro e Paolo," 28 June 2013, http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2013/06/28/0427/00980.html (20 May 2018).

The following day, 29 June 2013, in his homily during the Mass for the imposition of the pallium upon metropolitan archbishops, Pope Francis continued his reflections on synodality in an ecumenical context. He urged: "Let us go forward on the path of synodality, and grow in harmony with the service of the primacy." FRANCIS, "Papal Mass on the Solemnity of Saints Peter and Paul, Imposition of the Sacred Pallium on Metropolitan Archbishops, Homily of Pope Francis," 29 June 2013, http://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco_20130629_omelia-pallio.html (20 May 2018).

Some weeks later, during an interview on 19 August 2013 with Antonio Spadaro, S.J., Pope Francis stated that the Catholic Church can learn about episcopal collegiality and synodality, to be lived at various levels, from the Orthodox: "We must walk together: the people, the bishops, and the pope. Synodality should be lived at various levels. Maybe it is time to change the methods of the Synod of Bishops, because it seems to me that the current method is not dynamic. This will also have ecumenical value, especially with our Orthodox brethren. From them we can learn more about the meaning of episcopal collegiality and the tradition of synodality. The joint effort of reflection, looking at how the church was governed in the early centuries, before the breakup between East and West, will bear fruit in due time. In ecumenical relations it is important not only to know each other better, but also to recognize what the Spirit has sown in the other as a gift for us. I want to continue the discussion that was begun in 2007 by the joint [Catholic–Orthodox] commission on how to exercise the Petrine primacy, which led to the signing of the Ravenna Document. We must continue on this path. … We must walk united with our differences: there is no other way to become one. This is the way of Jesus." A. SPADARO, "Pope Francis' Interview with Jesuit Magazines", 19 August 2013, in *Origins*, 43 (2013-2014), 301. See also ID., "Intervista a Papa Francesco," in *La Civiltà Cattolica*, 3918 (19 September 2013), 466.

Over three months later, in *Evangelii gaudium*, 246, Pope Francis repeated that Catholics can learn much from the Orthodox about synodality: "in the dialogue with our Orthodox

1.8 — Synodality can provide insights to the Petrine ministry

Pope Francis suggests that synodality can lead to new insights into the Petrine office, which can result in the exercise of the papal ministry in a new way.[34] The Pope says:

> I am persuaded that in a synodal Church, greater light can be shed on the exercise of the Petrine primacy. The Pope is not, by himself, above the Church; but within it as one of the baptized, and within the College of Bishops as a Bishop among Bishops, called at the same time — as Successor of Peter — to lead the Church of Rome which presides in charity over all the Churches [cf. SAINT IGNATIUS OF ANTIOCH, *Epistula ad Romanos*, Proemium, *PG*, 5, 686].
>
> While reaffirming the urgent need to think about "a conversion of the papacy" [FRANCIS, *Evangelii gaudium*, 32], I willingly repeat the words of my predecessor Pope John Paul II: "As Bishop of Rome I am fully aware [...] that Christ ardently desires the full and visible communion of all those Communities in which, by virtue of God's faithfulness, his Spirit dwells. I am convinced that I have a particular responsibility in this regard, above all in acknowledging the ecumenical aspirations of the majority of the Christian Communities and in heeding the request made of me to find a way of exercising the primacy which, while in no way renouncing what is essential

brothers and sisters, we Catholics have the opportunity to learn more about the meaning of episcopal collegiality and their experience of synodality. Through an exchange of gifts, the Spirit can lead us ever more fully into truth and goodness."

See L. FORESTIER, "Le pape François et la synodalité. *Evangelii gaudium*, nouvelle étape dans la réception de Vatican II," in *Nouvelle revue théologique*, 137 (2015), 608; A. MAFFEIS, "La sinodalità come opportunità ecumenica," in L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo*, 93-122; P. SZABÓ, "Possibili sviluppi della sinodalità: proposizioni orientali," in ID., *A cinquant'anni dall'Apostolica sollicitudo*, 125-135.

[34] J.D. Faris observes that some structures of synodal governance already exist in the Latin Church: "While monarchial governance, e.g., the papacy, is most evident in Catholic governance, synodality is not entirely absent in Catholic governance structures. The Eastern churches in full communion with Rome have synodal structures. There are expressions of synodality in the Latin Church. When conferences of bishops (*CIC* 447-459) were formally established by the Second Vatican Council, more than forty conferences of bishops had already been organized before the Council. Pope Paul VI established the Synod of Bishops as a consultative body representative of the universal Church in 1966."

J.D. FARIS, "Synods, Councils, and Assemblies: Hierarchical Structures as Expressions of Synodality," 191.

See also W. KASPER, "Petrine Ministry and Synodality," in *The Jurist*, 66 (2006), 298-309; M.G. MASCIARELLI, *Un popolo sinodale*, 107-139; D. SALACHAS, "La sinodalità nel *Codice dei canoni delle Chiese orientali* e confronti con il *Codice di diritto canonico* della Chiesa latina," in L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo*, 55-92.

to its mission, is nonetheless open to a new situation" [SAINT JOHN PAUL II, *Ut unum sint*, 95].[35]

1.9 — Synodality can assist civil society to be built up in justice and fraternity

The Holy Father envisions that a synodal Church, which involves a rediscovery of human dignity and an understanding that authority is service, can assist in reforming the secular order.[36] The result would be a more just society. He says:

> Our gaze also extends to humanity as a whole. A synodal Church is like a standard lifted up among the nations (cf. *Is* 11:12) in a world which – while calling for participation, solidarity, and transparency in public administration – often consigns the fate of entire peoples to the grasp of small but powerful groups. As a Church which "journeys together" with men and women, sharing the travails of history, let us cherish the dream that a rediscovery of the inviolable dignity of peoples and of the function of authority as service will also be able to help civil society to be built up in justice and fraternity, and thus bring about a more beautiful and humane world for coming generations [FRANCIS, *Evangelii gaudium*, 186-192; ID, *Laudato Si'*, 156-162].

1.10 — Synodality is not optional for the Church

Pope Francis makes it clear that synodality is not optional for the Church.[37] God expects the Church to be synodal. "We must continue along this path. The world in which we live, and which we are called to love and serve, even

[35] It would seem that synodality would also provide for a "sound decentralization," which Pope Francis acknowledges as a need: see *Evangelii gaudium*, 16.

[36] See INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," nn. 118-119.

[37] After the 2015 synod of bishops, Gerard O'Connell remarked to Cardinal Blase Cupich: "I presume the American church too now has to buy into this concept of 'a synodal church' because the pope, in his October 17 speech, said that's the direction we're going." Cupich replied: "Yes, I think that the church in the United States, the church in any country now, just like we had to respond to the Second Vatican Council, we're going to have to respond to this new reality. This is a new reality, let's not sidestep that. This is a new reality about the life of the church. The pope made it very clear: synodality is about the church acting in a new and in a different way. The pope has said that. Now it's for us to take that in hand and make sure that we define our priorities as a bishops' conference, but also in our own dioceses according to that model." G. O'CONNELL, "Cupich: At the Synod, Pope Francis 'Taught Us All How to Walk Together'," in *America Magazine*, 28 October 2015, https://www.americamagazine.org/content/dispatches/cupich-synod-pope-francis-taught-us-all-how-walk-together (20 May 2018).

with its contradictions, demands that the Church strengthen cooperation in all areas of her mission. It is precisely this path of *synodality* which God expects of the Church of the third millennium."[38] Synodality is a divine mandate.

2 — *The Meaning of Synodality*

In his jubilee address to the synod of bishops on 17 October 2015, Pope Francis presents his reflections on the synodality of the Church. Synodality, the process of journeying together, is a constitutive element of the Church by the divine plan. It is not optional, such that it can be freely embraced or ignored. It demands mutual listening. It is to be lived practically at every level of the Church and involves all the People of God.[39] It is a reality which may be easy to express in words, but not so easy to implement. Synodality is the way the Church "is" – it is our constant "way of being," our *modus essendi*. It follows that synodality is also our constant "way of behaving," our *modus agendi* – both in our daily and regular interrelating (we may call this universal/catholic, common, or "informal" synodality) and in the operation of our structures (we may call this organized, structured, or "formal" synodality).[40] We remember: *agere sequitur esse*, our way of behaving

See also Blase CUPICH, "Synodality: Pope Francis Calls for a New Way of Being Church," in *Chicago Catholic*, 15-28 November 2015, http://www.chicagocatholic.com/column/archbishop-cupich/2015/11/15/synodality-pope-francis-calls-for-a-new-way-of-being-church (15 June 2017).

[38] In an interview with Elisabetta Piqué of *La Nation*, Pope Francis had said that God expects the Church to walk the path of synodality: "I am not afraid of walking the synod road (synod comes from the Greek "syn," "odos" walk together) because that is the path that God expects us to walk. Indeed, the Pope is the ultimate guarantor." E. PIQUÉ, "Pope Francis: 'God has Bestowed on Me a Healthy Dose of Unawareness'," 7 December 2014, http://www.lanacion.com.ar/1750350-pope-francis-god-has-bestowed-on-me-a-healthy-dose-of-unawareness (20 May 2018).

See L. BALDISSERI, "Introduzione," "Commemorazione del 50.mo anniversario del Sinodo dei Vescovi: Introduzione, Relazione commemorativa e Comunicazioni," 17 October 2015, www.press.vatican.va/content/salastampa/it/bollettino/pubblico/2015/10/17/0795/01758.html (20 May 2018).

[39] Joseph A. Komonchak comments: "A theology of synodality rests upon the conviction, which might be considered too obvious to need to be stated, that there is no Church except in Christian believers, no Church except in and out of assemblies of believers. To take synodality seriously requires one to think concretely about the Church." J.A. KOMONCHAK, "Theological Perspectives on the Exercise of Synodality," 349.

[40] See INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," nn. 42-43.

follows upon our way of being. What we do and how we do it reflects who we are.[41]

Synodality is found most commonly and appropriately in routine and constant interactions among believers.[42] It is also present in the more formal "synodal structures" in the particular Church (i.e., the "organs of communion," as Pope Francis calls them in the jubilee address; or the "means of participation," as he calls them in *Evangelii gaudium*, 31).[43] Certainly, it is present in the activities and relations of the parish,[44] and in the daily rapport of missionary disciples in the "marketplace."

[41] Gilles Routhier comments: "La synodalité, qui est une dimension constitutive de l'Église et qui appartient à sa nature même, appellée donc des pratiques, des figures institutionnelles et des procedures qui en permettent la réalisation. Autrement, elle est réduite à une vague sentiment." G. ROUTHIER, "La synodalité dans l'Église locale," 695-695.

See also E. CORECCO, "Sinodalità," in G. BARBAGLIO and S. DIANICH (eds.), *Nuovo dizionario di teologia*, 6th ed., Torino, Edizioni Paoline, 1991, 1452-1455; J. GAUDEMET, "Aspetto sinodale dell'organizzazione della diocesi. Excursus storio," in M. GHISALBERTI and G. MORI (eds.), *La sinodalità nell'ordinamento canonico*, Padova, CEAM, 1991, 195-230.

[42] Alphonse Borras comments: "À côté d'une synodalité *informelle* résultant de l'écoute mutuelle et du partenariat des baptisés dans la mission, il y a une pratique plus *formelle* de la synodalité selon des manières plus ou moins formalisées et différents niveaux d'institutionnalisation.… Il reste cependant que la synodalité peut difficilement exister sans lieux institutionnels ni procédures de mise en œuvre." A. BORRAS, "Trois expressions de la synodalité depuis Vatican II," 650.

See also M. FAGGIOLI, "Institutions of Episcopal Collegiality-Synodality after Vatican II: The Decree *Christus Dominus* and the Agenda for Collegiality-Synodality in the 21st Century," in *The Jurist*, 64 (2004), 224-246.

[43] See INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," nn. 77-82. For further reflections on synodality within the particular Church, see D. VITALI, "I soggetti della sinodalità alla luce dell'ecclesiologia del Concilio Vaticano II," 176-177; G. INCITTI, "Prospettive giuridiche sull'esercizio della sinodalità," 389-390; B.D. DE LA SOUJEOLE, "Nature synodale del l'Église et fonction du Synode des évêques," in L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo*, 215-217; SAN JOSÉ PRISCO, "Sinodalidad en la Iglesia particular," 403-405; A. BORRAS, "Évolutions souhaitables en matière de synodalité sur le plan des 'instances intermédiaires'," 263-266, 268-271; P. ŽUREK, *Indagine sulla sinodalità. La riflessione cattolica dopo il Concilio Vaticano II con alcuni risvolti ecumenici*, Rome, Pontificia Università Lateranense, 2002, esp. 254-319.

[44] Gerald M. Kicanas writes about synodality at the level of the parish. "In *Evangelii gaudium* … Francis laments that 'the call to review and renew our parishes has not yet sufficed to bring them nearer to people, to make them environments of living communion and participation, and to make them completely mission oriented' (n. 28). This is the way a synodal church should be." G.M. KICANAS, "Journeying Together," in *CLSAP*, 78 (2016), 64.

See also INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," nn. 83-84; M.G. MASCIARELLI, *Parrocchia synodale: Casa del populo di Dio*, Todi, Tau Editrice, 2016; F. COCCOPALMERIO, "La 'consultività' del consiglio pastorale parrocchiale e del consiglio per gli affair economici della parrocchia," in *Quaderni di diritto canonico*, 1 (1988), 60-65.

2.1 — What Synodality *Does Not* Mean

"Synodality" is a concept which may be unfamiliar to many. Consequently, it seems prudent to consider what synodality *does not* mean and what it *does* mean. We shall first consider what it *does not* mean.

2.1.1 — *Synodality does not mean that church leaders lose their authority and their duty to provide pastoral care for the People of God*

The spirit and practice of synodality does not mean that those who lead the Church lose their exercise of authority in providing pastoral care to the People of God. Those who govern continue to exercise their role, rightly understood in the *only* way that it *can* be understood – as a ministry of service, imitating Jesus the Servant who came "to serve, not to be served" (*Mark* 10:45; *Matthew* 20:28). He models servanthood when he washes the feet of his apostles. The Gospel of John recounts:

> So when he had washed their feet [and] put his garments back on and reclined at table again, he said to them, "Do you realize what I have done for you? You call me 'teacher' and 'master,' and rightly so, for indeed I am. If I, therefore, the master and teacher, have washed your feet, you ought to wash one another's feet. I have given you a model to follow, so that as I have done for you, you should also do. Amen, amen, I say to you, no slave is greater than his master nor any messenger greater than the one who sent him. If you understand this, blessed are you if you do it" (*Jn* 13:12-17).[45]

Synodality does not eliminate the pastoral authority of church leaders, but encourages them to exercise their authority with a renewed awareness of service. Synodality prompts leaders to heed more intensely the prophetic challenge of Pope Francis to "smell like their sheep" (see *Evangelii gaudium*, 24). This is exemplified most profoundly in Jesus, the Good Shepherd who lays down his life for the sheep (*John* 10:11), who knows his sheep and whose sheep know him (*John* 10:14). The Good Shepherd, "though he was in the form of God did not regard equality with God something to be grasped. Rather, he emptied himself, taking the form of a slave, coming in human likeness; and found human in appearance, he humbled himself…" (*Philippians* 2:6-8). Without any doubt, we realize that Jesus, the Good Shepherd,

[45] Scripture translations are from the *New American Bible*.

BENEDICT XVI had offered the brief comment about Jesus washing his disciples' feet. Angelus, 29 January 2012, http://w2.vatican.va/content/benedict-xvi/en/angelus/2012/documents/hf_ben-xvi_ang_20120129.html (20 May 2018), referenced in M.G. MMASCIARELLI, *Un popolo sinodale*, 147.

assumed the "smell" of the sheep by his incarnation when he became "Emmanuel" – "God with us." Those who lead the Church in Jesus' name must do the same! Synodality promotes radical identification of church leaders with Jesus. Synodality counters a mindset whereby a leader asks "who are you to question my authority?" and instills a mindset whereby a leader asks "who am I to judge or to condemn?" (see *Luke* 12:14, *John* 8:11, 15).

2.1.2 — *Synodality does not mean that the Church has become a "democracy," reflecting secular political models*

The spirit and practice of synodality does not create a sort of "democratization" of the Church, reflecting secular political models.[46] Within the Church remains the authority of service, a gift of the Lord to the Church,

[46] In his 11 September 2004 address to the bishops of Pennsylvania and New Jersey, Pope John Paul II explained that creating structures for participation, consultation, and shared responsibility is an intrinsic requirement of the episcopacy, not a concession to secular democratic forms of governance: "Within a sound ecclesiology of communion, a commitment to creating better structures of *participation*, *consultation*, *and shared responsibility* should not be misunderstood as a concession to a secular 'democratic' model of governance, but as *an intrinsic requirement* of the exercise of episcopal authority and a necessary means of strengthening that authority." JOHN PAUL II, "Address to the Bishops of the Ecclesiastical Region of Pennsylvania and New Jersey (U.S.A.) on their *Ad limina* Visit," 11 September 2004, http://w2.vatican.va/content/john-paul-ii/en/speeches/2004/september/documents/hf_jp-ii_spe_20040911_ad-limina-usa.html (20 May 2018).

John D. Faris writes: "As a form of government, synodality 'rings true' to democratic sensibilities of the twenty-first century. … Synodality presumes active collective involvement. However, synodality is not to be identified with democracy in consideration of significant divergences.… Synodal governance is not democratic governance.… It must be the object of every participant and process to seek the truth under the inspiration of the Holy Spirit. The discernment process might take the form of voting or election, but … it must be the truth and not the majority that necessarily prevails." J.D. FARIS, "Synods, Councils, and Assemblies: Hierarchical Structures as Expressions of Synodality," 191-192.

Moreover, Alphonse Borras remarks: "Le concept de synodalité est, selon moi, tout à faire approprié pour designer la dynamique participative de la communion ecclésiale ou ce que d'aucuns nomment des pratiques démocratiques dans l'Église ; dans ce sens, il rencontre les aspirations légitimes de « démocratie » dans l'Église. Mais il importe cependant de souligner que ce dernier concept provient de la philosophie politique et du droit souligner que ce dernier concept provient de la philosophie politique et du droit séculier, in particulier constitutionnel, et qu'il est de ce fait impropre à qualifier la réalité ecclésiale – l'Église n'est pas plus « démocratique » que la famille, mais il y a bel et bien, dans les familles comme dans nos communautés, des pratiques participatives…." A. BORRAS, "Trois expressions de la synodalité depuis Vatican II," 650.

See also M.G. MASCIARELLI, *Un popolo sinodale*, 86; B.E. HINZE, "Synodality in the Catholic Church," in *Theologische Quartalschrift*, 192 (2012), 127-130; INCITTI, "Prospettive giuridiche sull'esercizio della sinodalità," 371.

which both assures fidelity to and communion with the apostolic Tradition, and which also frees the integrity of the faith from the whims and interests of politics.[47] This authority of service is not compromised by emphasizing that the entire People of God "journey together" and share individual gifts of the Spirit during the journey. Each member is endowed with unique gifts of the Spirit for the common good, as Saint Paul teaches the Church in Corinth.

> There are different kinds of spiritual gifts but the same Spirit; there are different forms of service but the same Lord; there are different workings but the same God who produces all of them in everyone. To each individual the manifestation of the Spirit is given for some benefit. To one is given through the Spirit the expression of wisdom; to another the expression of knowledge according to the same Spirit; to another faith by the same Spirit; to another gifts of healing by the one Spirit; to another mighty deeds; to another prophecy; to another discernment of spirits; to another varieties of tongues; to another interpretation of tongues. But one and the same Spirit produces all of these, distributing them individually to each person as he wishes. (1 *Corinthians* 12:4-11)[48]

Nothing is lost when members share the gifts received from the Spirit: to the contrary, the entire pilgrim People of God is enriched. The Spirit's distinct gifts are complementary, not conflictual. They promote communion, not discord. Distinct gifts do not compromise the fundamental equality of each member of the Church, as the Code declares: "there exists among all the Christian faithful a true equality regarding dignity and action by which they all cooperate in the building up of the Body of Christ, according to each one's own condition and function" (c. 208). Nor does the fundamental equality of each member of the Church imply that every member has identical gifts. Some are called to a ministry of leadership, as Saint Paul teaches the Church in Ephesus. "But grace was given to each of us according to the measure of Christ's gift.… And he gave some as apostles, others as prophets, others as evangelists, others as pastors and teachers, to equip the holy ones for the work of ministry, for building up the body of Christ, until we all

[47] The INTERNATIONAL THEOLOGICAL COMMISSION cautions about the influence of passing trends confronting the Church: "The new networks of communication both inside and outside the Church call for new forms of attention and critique, and the renewal of skills of discernment. There are influences from special interest groups which are not compatible, or not fully so, with the Catholic faith; there are convictions which are only applicable to a certain place or time; and there are pressures to lessen the role of faith in public debate or to accommodate traditional Christian doctrine to modern concerns and opinions." "*Sensus fidei* in the Life of the Church," n. 117.

[48] 1 *Corinthians* 12:7 is referenced in *LG* 12.

attain to the unity of faith and knowledge of the Son of God" (*Ephesians* 4:7, 11-13).

The spirit and practice of synodality is rooted in the faith that, for some benefit of all, the Spirit pours out enriching and abundant gifts on distinct members of the Church. Synodality acknowledges that among the various gifts is the ministry of leadership. This leadership includes apostles, prophets, evangelists, pastors, teachers, elders, bishops, presbyters, etc. Synodality does not introduce into the Church a kind of "democratization" reflecting secular political models. Rather, it enables the proper sharing of the Spirit's diverse gifts for the common good. In the practice of synodality, we endeavor to seek out God's will and the means to respond effectively to it. Such truth is the result of "common faith-filled discernment," not a "democratic majority vote."

2.1.3 — *Synodality does not mean that the conclusions of synodal structures must always be deliberative or consent-giving, rather than consultative*

The spirit and practice of synodality does not mean that synodal structures must always function with a deliberative vote or a consensual vote. Seldom do structures of synodality function with a consensual vote, and even less often do they function with a deliberative vote. Instead, they function most commonly with a consultative vote. In his jubilee address, Pope Francis explains that the synod of bishops functions with a consultative vote, which "is not a limitation of freedom, but a guarantee of unity."[49] A consultative

[49] The INTERNATIONAL THEOLOGICAL COMMISSION discusses "consultation," which it identifies as a practice with a long history in the life of the Church:

> 120. There is a genuine equality of dignity among all the faithful, because through their baptism they are all reborn in Christ. "Because of this equality they all contribute, each according to his or her own condition and office, to the building up of the Body of Christ" [c. 208]. Therefore, all the faithful "have the right, indeed at times the duty, in keeping with their knowledge, competence, and position, to manifest to the sacred pastors their views on matters which concern the good of the Church." "They have the right to make their views known to others of Christ's faithful, but in doing so they must always respect the integrity of faith and morals, show due reference to the pastors and take into account both the common good and the dignity of individuals" [c. 212 § 3]. Accordingly, the faithful, and specifically the lay people, should be treated by the Church's pastors with respect and consideration, and consulted in an appropriate way for the good of the Church.
>
> 121. The word "consult" includes the idea of seeking a judgment or advice as well as inquiring into a matter of fact. On the one hand, in matters of governance and pastoral issues, the pastors of the Church can and should consult the faithful in certain cases in the

vote given by synodal structure to its competent leader promotes the unity of the Church and preserves the apostolic Tradition. The leader receives the recommendation of the synodal structure. The leader must discern whether or not to implement the recommendation. The conscience of the leader must focus on the common good of the community, the apostolic Tradition, and the unity between the local community and the entire Church which the leader must help maintain *sub Petro* and *cum Petro*. If the leader does not accept the recommendation presented by a synodal structure, the leader would explain transparently the rationale for the non-acceptance.[50]

sense of asking for their advice or their judgment. On the other hand, when the magisterium is defining a doctrine, it is appropriate to consult the faithful in the sense of inquiring into a matter of fact, "because the body of the faithful is one of the witnesses to the fact of the tradition of revealed doctrine, and because their consensus through Christendom is the voice of the Infallible Church" [John Henry NEWMAN, *On Consulting the Faithful in Matters of Doctrine*, edited with an introduction by John COULSON, London, Geoffrey Chapman, 1961, 63; for the double meaning of the word "consult," see 54-55].

122. The practice of consulting the faithful is not new in the life of the Church. In the medieval Church a principle of Roman law was used: *Quod omnes tangit, ab omnibus tractari et approbari debet* (what affects everyone, should be discussed and approved by all). In the three domains of the life of the Church (faith, sacraments, governance), "tradition combined a hierarchical structure with a concrete regime of association and agreement," and this was considered to be an "apostolic practice," or an "apostolic tradition" [Y. CONGAR, "Quod omnes tangit, ab omnibus tractari et approbari debet," in *Revue historique de droit français et étranger*, 36 (1958), 210-259, esp. 224-228]. INTERNATIONAL THEOLOGICAL COMMISSION, "*Sensus fidei* in the Life of the Church." See also SAN JOSÉ PRISCO, "Sinodalidad en la Iglesia particular," 406.

Joseph A. Komonchak identifies other injunctions of earlier Church leaders whereby participation of all the faithful was expected in matters involving them.

Celestine I: "Nullus invitis detur episcopus. Cleri, plebis et ordinis, consensum ac desiderium requiratur" (*Epistula* 4, 5: *PL* 50, 434); Leo I echoed the point and also provided the reason: "Nullus invitis et non petentibus ordinetur; ne civitas episcoporum non optatum aut contemnat aut oderit; et fiat minus religiosa quam convenit, cui non licuerit habere quem voluit (*Episcula* 13, 6: *PL* 54, 673), and also provided his own pithy statement: "Qui praefuturus est omnibus ab omnibus eligatur" (*Epistula* 10, 6: *PL* 54, 634). And it was a commonplace of medieval law that "Quod omnes tangit ab omnibus adprobari debet." And Cypian anticipated them all: "A principio episcopatus mei statuerim nihil sine consilio vestro et sine consensus plebis mea privatim sententia gerere" (*Epistula* 5, 4: *PL* 4, 234). J.A. KOMONCHAK, "Theological Perspectives on the Exercise of Synodality," 356, fn. 19.

[50] Providing a leader's rationale for not accepting a recommendation from a synodal structure reflects c. 127 § 2, 2°: "When it is established by law that in order to place acts a superior needs the consent or counsel of certain persons as individuals ... if counsel is required, the act of a superior who does not here those persons is invalid; although not obliged to accept their opinion even if unanimous, a superior is nonetheless not to act contrary to that opinion, especially if unanimous, without a reason which is overriding in the superior's judgment." A superior needs an overriding reason not to follow individuals' opinion, especially if

2.1.4 — *Synodality does not mean that new structures must be established in the Church before synodality can be experienced*

From its very beginning, under the guidance of the Holy Spirit, new structures have continued to be introduced into the Church; therefore, it can be expected that new structures will evolve in the Church.[51] Indeed, some of these new structures will follow "experimental" synodal practices in various contexts.[52] Nonetheless, the spirit and practice of synodality does not mean that new structures *need* to be introduced into the Church so that synodality can be experienced among the missionary disciples.[53] To the contrary, the Church currently has multiple structures in which the practice of synodality should occur. The challenge facing church leaders and members of synodal structures is how to incorporate the spirit and practice of synodality into these structures. Pope Francis is aware of this challenge when he remarks during his jubilee address: "Journeying together … is an easy concept to put into words, but not so easy to put into practice." Putting synodality into practice requires an accurate understanding of the notion of synodality, which involves prayerful discernment, human respect, faith in the Spirit's diverse but complimentary gifts, honest speaking, and, most of all, very open mutual listening. Synodality is the way that the Church lives and acts as the Church, whether with existing structures or with new structures.

unanimous. It would be very responsible for the superior to explain that overriding rationale to those individuals who offer their opinion. See INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," fn. 82.

[51] Pope Francis called for a renewal of ecclesial structures in *Evangelii gaudium*, 27: "I dream of a 'missionary option,' that is, a missionary impulse capable of transforming everything, so that the Church's customs, ways of doing things, times and schedules, language and structures can be suitably channeled for the evangelization of today's world rather than for her self-preservation. The renewal of structures demanded by pastoral conversion can only be understood in this light…."

See also FRANCIS, "Apostolic Journey to Rio de Janeiro, Address to the Leadership of the Episcopal Conferences of Latin America during the General Coordination Meeting," Sumaré Study Center, 28 July 2013, https://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130728_gmg-celam-rio.html (20 May 2018); INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," n. 76; J.A. KOMONCHAK, "Theological Perspectives on the Exercise of Synodality," 356-357.

[52] MASCIARELLI, *Un popolo sinodale*, 139, reflects: "la sinodalità é stata prima practicata e poi riflettuta theologicamente e canonisticamente. Non sarebbe male che la pastorale divenisse un luogo fervido di sperimentazione sinoldale…." See also M. WIJLENS, "Reforming the Church," 259.

[53] Nonetheless, it may be expected that future legislation would pronounce more precisely on the obvious synodal nature of various structures in the Church. Indeed, perhaps more synodal structures would be established, and a deliberative *votum* could be assigned more broadly and often among these structures. See J.M. KICANAS, "Journeying Together," 66.

2.2 — What Synodality *Does* Mean

Seeing what synodality does *not* mean already says much about what it *does* mean. We shall now consider further aspects of the meaning of synodality.

2.2.1 — *Synodality means that all members of the Church acknowledge the gifts of the Spirit and share them generously*

The spirit and practice of synodality means that all members of the Church believe that the Spirit bestows complimentary gifts to each member of the People of God,[54] and each member is expected to share individual gifts to further the mission of the Church. The Holy Spirit is the compass leading the synodal Church with manifold gifts, each bestowed mysteriously upon individuals according to the divine design. Canon 204 § 1, the first canon in Book II, "The People of God," expresses this faith: "The Christian faithful are those who, inasmuch as they have been incorporated in Christ through baptism, have been constituted as the people of God. For this reason, made sharers in their own way in Christ's priestly, prophetic, and role function, they are called to exercise the mission which God has entrusted to the Church to fulfill in the word, in accord with the condition proper to each."[55]

[54] Pope Francis explains that he prefers and often uses the image of the Church as the People of God and adds:

> The people itself constitutes a subject. And the church is the people of God on the journey through history, with joys and sorrows. Thinking with the church, therefore, is my way of being a part of this people. And all the faithful, considered as a whole, are infallible in matters of belief, and the people display this *infallibilitas in credendo,* this infallibility in believing, through a supernatural sense of the faith of all the people walking together. This is what I understand today as the "thinking with the church" of which St. Ignatius speaks. When the dialogue among the people and the bishops and the pope goes down this road and is genuine, then it is assisted by the Holy Spirit. So this thinking with the church does not concern theologians only.…
>
> And, of course, we must be very careful not to think that this *infallibilitas* of all the faithful I am talking about in the light of Vatican II is a form of populism. No; it is the experience of "holy mother the hierarchical church," as St. Ignatius called it, the church as the people of God, pastors and people together. The church is the totality of God's people. A. SPADARO, "Pope Francis' Interview with Jesuit Magazines," 299.

[55] On the conditions proper to various members of the Christian faithful, see also cc. 208 (on building up the Body of Christ); 210 (on leading a holy life, and promoting the growth and continued sanctification of the Church); 216 (on promoting or sustaining apostolic action even by their own undertakings); 225 § 2 (on imbuing and perfecting the temporal order with the spirit of the Gospel); 229 § 1 (on acquiring knowledge of Christian doctrine); 231 § 2 (on receiving appropriate remuneration for special service to the Church), etc.

Acknowledging the multiple, diverse, and complementary gifts of the Spirit to all members of the Church[56] leads to greater participation in the life and mission of the Church, understood as *communio* (κοινωνία).[57] In various ways, everyone in the Church receives the Spirit's distinct gifts.[58] An awareness of these gifts strengthens the missionary witness of the Church. It impels all to be missionary disciples with the common vocation to evangelize the entire world in every time and place, one situation at a time, each using one's individual Spirit-given gifts. Such common sharing of the Spirit's gifts enriches synodality, which is the proper way of being the Church.[59] Any notion that only some members of the Church are endowed with the Spirit's gifts is woefully wrong.[60] All God's gifted children are the face and presence of God in the world. All are co-responsible for the mission of Christ. Indeed, Pope John Paul II said that all the

[56] The INTERNATIONAL THEOLOGICAL COMMISSION comments that the effectiveness of structures of consultation requires mutual respect of various charisms and respectful listening: "Structures of consultation … can be greatly beneficial to the Church, but only if pastors and lay people are mutually respectful of one another's charisms and if they carefully and continually listen to one another's experiences and concerns. Humble listening at all levels and proper consultation of those concerned are integral aspects of a living and lively Church." INTERNATIONAL THEOLOGICAL COMMISSION, "*Sensus fidei* in the Life of the Church," 126.

[57] In his post-synodal apostolic exhortation *Christifideles laici*, John Paul II recalled that the 1985 extraordinary synod of bishops identified the theology of *communio* as a central and fundamental concept of Vatican Council II: JOHN PAUL II, Post-synodal Apostolic Exhortation on the Vocation and the Mission of the Lay Faithful in the Church and in the World *Christifideles laici*, 30 December 1988, in *AAS*, 81 (1989), 393-521, n. 19, English translation in *Origins*, 18 (1988-1989), 561-595.

See CONGREGATION FOR THE DOCTRINE OF THE FAITH, Letter to the Bishops of the Catholic Church on Some Aspects of the Church Understood as Communion *Communionis notio*, 28 May 1992, in *AAS*, 85 (1993), 838-850, English translation in *Origins*, 22 (1992-1993), 108-112.

See also O. RUSH, "The Church Local and Universal and the Communion of the Faithful," 127; and J.M. KICANAS, "Journeying Together," 68.

[58] See L. GIOIA, "The Recent Practice of Synodality and Its Ecclesiological Significance in the Light of Pope Francis' *Evangelii gaudium*," 16, https://www.academia.edu/25532592/The_Recent_Practice_of_Synodality_and_its_Ecclesiological_Significance_in_the_Light_of_Pope_Francis_Evangelii_Gaudium (20 May 2018).

[59] See J.J. MCELWEE, "Cardinal Cupich: Francis Is Giving New Life to Vatican II Reforms," in *National Catholic Reporter*, 13 March 2017, https://www.ncronline.org/news/vatican/cardinal-cupich-francis-giving-new-life-vatican-ii-reforms (20 May 2018).

[60] G. Routhier comments : "Quant aux dons multiples et varies de l'Esprit Saint, personne ne les monopolise. Ils sont répartis dans l'ensemble du Corps. La synodalité a un fondement sacramental, et la célébration de l'eucharistie permet de la penser, en mettant en valeur la présidence de l'évêque, la collaboration des autres ministres et la participation active et consciente de tous." G. ROUTHIER, "La synodalité dans l'Église locale," 703.

faithful are co-responsible for the mission of the Church.[61] Pope Benedict XVI emphasized the same.[62]

2.2.2 — *Synodality means that church leaders would serve more effectively, having learned more clearly the needs of their communities, especially through careful listening*

The spirit and practice of synodality means that leaders in the Church would serve more effectively, having been informed more clearly of the pastoral needs of their communities. Synodality connects leaders to the basic needs of those to whom the leaders minister. It demonstrates awareness that ecclesial authority and leadership is a practical service, and that those serving and those served are fellow travelers on a common journey. It requires that church leaders be close to those whom they serve.[63] When a decision is reached through a synodal process, it is likely that the conclusion will not be surprising to anyone. After all, the synodal process involves the leader and those served journeying together, sharing, and dialoging. Careful and mutual listening must be the habitual attitude whereby disciples spontaneously

[61] JOHN PAUL II, post-synodal apostolic exhortation *Christifideles laici*, 30 December 1988, nn. 15, 21. The official Latin text is quite clear: "Ex ipsa communi dignitate Baptismi christifidelis laicus corresponsabilis est, una cum ministris ordinatis, religiosis viris et mulieribus, missionis Ecclesiae.… Ecclesia enim ducitur atque gubernato a Spiritu, qui diversa dona hierarchica et charismatica inter baptizatos omnes dispergit, singulos advocans ut, sua quisque ratione, et activi et corresponsabiles fiant." In *AAS*, 81 (1989), 413, 417.

[62] See, for example, BENEDICT XVI, Message for the 81st World Mission Sunday "All the Churches for All the World," 27 May 2007, http://w2.vatican.va/content/benedict-xvi/en/messages/missions/documents/hf_ben-xvi_mes_20070527_world-mission-day-2007.html (20 May 2018); ID., "Apertura del convengo pastorale della Diocesi di Rome sul tema: 'Appartenenza eccelsiale e corrresponsibilità pastorale," 26 May 2009, http://w2.vatican.va/content/benedict-xvi/it/speeches/2009/may/documents/hf_ben-xvi_spe_20090526_convegno-diocesi-rm.html (20 May 2018); ID., "Messaggio del Santo Padre Benedetto XVI in occasione della VI Assemblea ordinaria del Forum Internazionale di Azione Cattolica," 10 August 2012, http://w2.vatican.va/content/benedict-xvi/it/messages/pont-messages/2012/documents/hf_ben-xvi_mes_20120810_fiac.html (20 May 2018).

[63] The INTERNATIONAL THEOLOGICAL COMMISSION says that, by journeying close to their faithful, bishops and priests come to see "new ways" vital for the new evangelization: "One of the reasons why bishops and priests need to be close to their people on the journey and to walk with them is precisely so as to recognise 'new ways' as they are sensed by the people …. The discernment of such new ways, opened up and illumined by the Holy Spirit, will be vital for the new evangelisation." INTERNATIONAL THEOLOGICAL COMMISSION, "*Sensus fidei* in the Life of the Church," n. 127.

interact.[64] Indeed, synodality is essential to the discernment process needed by a church leader to provide effective service in light of true pastoral needs.[65]

In this day of multiple means of social communication techniques, countless members of the Church can partake in any synodal process.[66] In 2013, the synod of bishops invited particular Churches to identify concerns in preparation for the synod on the family.[67] In 2014, the synod of bishops invited episcopal conferences to involve particular Churches and others in reflecting on the *lineamenta* for the October 2015 synod.[68] Most recently, in 2017, the synod of bishops offered an invitation "to the entire People of God" in preparation for the synod on youth.[69] Following these examples, particular

[64] G. Routhier comments: "La vie synodale exige donc un autre élément, une disposition à entendre, c'est-à-dire à prendre au sérieux et à accueillir avec sympathie, ce qui est dit. Il s'agit-là d'une attitude. La synodalité ne se réduit donc pas à une mécanique formelle, comme si la mise en place de figures institutionnelles et la mise en œuvre de procédures et de pratiques conséquentes suffisaient pour que l'on en vive. Au contraire, elle peut exister également là où des processus formels ne sont pas établis." G. ROUTHIER, "La synodalité dans l'Église locale," 701.

[65] Gilles Routhier, reflecting on the diocesan synod, comments on the reciprocity between the bishop and the members: "La loi promulguée par l'évêque est synodale. Il ne peut s'agir d'un décret épiscopal, qui n'aurait pas été élaboré synodalement. Par ailleurs l'assemblée à elle seule ne peut pas promulguer les décisions qu'elle a contribué à produire. En d'autres termes, la voix personnelle de l'évêque assume le discernement communautaire et le sanctionne de son autorité apostolique; il l'inclut aussi dans la communion des Églises. L'acte du discernement est commun et il est synodal. Chacun y prend part et y joue son rôle propre." G. ROUTHIER, "La synodalité dans l'Église locale," 694.

He also comments: "La *decision taking*, qui revient à celui qui préside à une Église locale, s'accompagne d'un processus de *decision making* qui inclue la participation des autres membres de l'Église." Ibid., 697.

[66] See O. RUSH, "The Church Local and Universal and the Communion of the Faithful," 126.

[67] SYNOD OF BISHOPS, "Pastoral Challenges to the Family in the Context of Evangelization: Preparatory Document," 2013, http://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20131105_iii-assemblea-sinodo-vescovi_en.html (20 May 2018). Section "III. Questions" of the document explains that the questions are addressed to particular Churches: "The following series of questions allows the particular Churches to participate actively in the preparation of the Extraordinary Synod, whose purpose is to proclaim the Gospel in the context of the pastoral challenges facing the family today."

[68] SYNOD OF BISHOPS, "The Vocation and Mission of the Family in the Church and Contemporary World: *Lineamenta*," 2014, in *Origins*, 44 (2014-2015), 489-503.

[69] SYNOD OF BISHOPS, "Documento Preparatorio della XV Assemblea Generale Ordinaria del Sinodo dei Vescovi sul tema 'I giovani, la fede, e il discernimento vocazionale,'" 13 January 2017, http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2017/01/13/0021/00050.html#EN (20 May 2018). It appears that the audience being consulted directly in preparation for the synod on youth is much broader than the audience consulted in preparation for the synod on the family.

Churches and their parts can employ various methods of social communication to involve communities in the synodal process, whereby local needs are expressed.[70]

2.2.3 — *Synodality means that enhanced among the People of God would be honest speaking and mutual listening*

To be effective, the spirit and practice of synodality requires a "mutual listening in which everyone has something to learn," as Pope Francis says in the jubilee address. Such listening requires honest speaking.[71] In his opening remarks to the 2014 synod of bishops, the Pope stressed the importance of honest speech, without which there cannot be effective listening. He asked all the participants "to say all that, in the Lord, one feels the need to say."

> I thank also you, dear Cardinals, Patriarchs, Bishops, priests, men and women religious, and lay men and women for your presence and for your participation, which enriches the works and spirit of *collegiality* and *synodality* for the good of the Church and of the family! I also wanted this spirit of synodality in the election of the Relator, the Special Secretary, and the President Delegates. The first two were elected directly by the Post-Synodal Council, by participants who attended the last Synod. However, given that the President Delegates must be chosen by the Pope, I asked that Post-Synodal Council to propose a few names, and I have appointed those proposed to me.
>
> You bring the voice of the Particular Churches, assembled at the level of local Churches through the Bishops' Conferences. The Universal Church and the Particular Churches are divine institutions; the local Churches are thus understood as human institutions. You will give voice in *synodality*. It is a great responsibility: to bring the realities and problems of the Churches, in order to help them to walk on that path that is the Gospel of the family.
>
> One general and basic condition is this: speaking honestly. Let no one say: "I cannot say this, they will think this or this of me...." It is necessary to say with *parrhesia*[72] all that one feels. After the last Consistory (February 2014), in which the family was discussed, a Cardinal wrote to me, saying: what a shame that several Cardinals did not have the courage to say certain things out of respect for the Pope, perhaps believing that the Pope might

[70] See J.A. RENKEN, "Pope Francis and Participative Bodies in the Church: Canonical Reflections," in *Studia canonica*, 48 (2014), 229.

[71] See INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," nn. 110-114.

[72] *Parrhesia* is boldness, candor, free disclosure, frankness. See INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," n. 121.

> think something else. This is not good, this is not *synodality*, because it is necessary to say all that, in the Lord, one feels the need to say: without polite deference, without hesitation. And, at the same time, one must listen with humility and welcome, with an open heart, what your brothers say. *Synodality* is exercised with these two approaches.
>
> For this reason I ask of you, please, to employ these approaches as brothers in the Lord: speaking with *parrhesia* and listening with humility.
>
> And do so with great tranquility and peace, so that the Synod may always unfold *cum Petro et sub Petro*, and the presence of the Pope is a guarantee for all and a safeguard of the faith.
>
> Dear brothers, let us all collaborate so that the dynamic of *synodality* shine forth.[73]

Honest speaking and mutual listening are essential in effective dialogue,[74] which involves *trust* that the speaker is truthfully speaking and *trust* that the listener is openly listening. Such trust is needed for the faithful "to make known to the pastors of the Church their needs, especially spiritual ones, and their desires" (c. 212 § 2).[75] Oftentimes, great and surprising things happen when persons speak honestly and listen attentively to one another. We recall, for instance, the reflection of the two disciples on the road to Emmaus whose

[73] FRANCIS, "Greetings of Pope Francis to the Synod Fathers during the First General Congregation of the Third Extraordinary General Assembly of the Synod of Bishops," 6 October 2014, https://w2.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141006_padri-sinodali.html (20 May 2018).

[74] Bradford E. Hinze, in a major address to the CLSA in 2008, identifies some challenges related to honest speaking and mutual listening within the Church:

> Some people have not developed the communication skills and virtues needed for participatory structures to develop and thrive. Some people find it difficult to listen genuinely and learn from others, especially from those with less or more experience or expertise or people who are different from them in one way or another. Others cannot speak effectively, they don't know when to speak or are too timid to do so, or don't know how to gauge their message to speak to a particular audience, or they simply don't know when to be quiet. Speaking out of ignorance can also be a problem – some people have not done their research, or don't have a satisfactory understanding of the identity and mission of the Church to offer reliable wisdom and prudential judgments. Some people have not learned how to contribute to a communal process of discernment and decision making about the Church's pastoral mission. These are not easy to learn, but the Church's vitality and pastoral effectiveness depend upon them. B.E. HINZE, "The Reception of Vatican II in Participatory Structures of the Church: Facts and Friction," in *CLSAP*, 70 (2008), 48.

[75] Canon 212 continues: "§ 3. According to the knowledge, competence, and prestige which they possess, they have the right and even at times the duty to manifest to the sacred pastors their opinion on matters which pertain to the good of the Church and to make their opinion known to the rest of the Christian faithful, without prejudice to the integrity of faith and morals, with reverence towards their pastors, and attentive to common advantage and the dignity of persons."

eyes are opened after they listen to Jesus speak and after they witness Jesus breaking bread with them. Luke says that they recount to one another: "Were not our hearts burning [within us] while he spoke to us on the way and opened the scriptures to us?" (Luke 24:32). Having listened attentively to the risen Jesus, although he vanishes from their sight, these two at once become "missionary disciples" who go to Jerusalem, there recounting to the Eleven and to others how Jesus has made himself known to them (Luke 24:33-35).

In *Evangelii gaudium*, 171, Pope Francis reflects on "the art of listening," which he describes as "an openness of heart which makes possible that closeness without which genuine spiritual encounter cannot occur." He invites us to "respectful and compassionate listening."

> Today more than ever we need men and women who, on the basis of their experience of accompanying others, are familiar with processes which call for prudence, understanding, patience, and docility to the Spirit, so that they can protect the sheep from wolves who would scatter the flock. We need to practice the art of listening, which is more than simply hearing. Listening, in communication, is an openness of heart which makes possible that closeness without which genuine spiritual encounter cannot occur. Listening helps us to find the right gesture and word which shows that we are more than simply bystanders. Only through such respectful and compassionate listening can we enter on the paths of true growth and awaken a yearning for the Christian ideal: the desire to respond fully to God's love and to bring to fruition what he has sown in our lives. But this always demands the patience of one who knows full well what Saint Thomas Aquinas tells us: that anyone can have grace and charity, and yet falter in the exercise of the virtues because of persistent "contrary inclinations" [*S. Th.* I-II, q. 65, a. 3 ad 2: "*propter aliquas dispositions contrarias*"]. In other words, the organic unity of the virtues always and necessarily exists *in habitu*, even though forms of conditioning can hinder the operations of those virtuous habits. Hence the need for "a pedagogy which will introduce people step by step to the full appropriation of the mystery" [JOHN PAUL II, post-synodal apostolic exhortation *Ecclesia in Asia* (6 November 1999), 20, in *AAS*, 92 (2000), 481]. Reaching a level of maturity where individuals can make truly free and responsible decisions calls for much time and patience. As Blessed Peter Faber used to say: "Time is God's messenger."

Those who speak must have the deeply-rooted and proven assurance that they will not be subject to retribution or retaliation for what they share as disciples of Jesus within the Church for the common good. They must be assured that they can speak from the heart without fear. Eradicating the fear to speak one's mind is an essential element of synodality. Good and effective communication (honest speaking and mutual listening) is fundamental to the

synodal process.[76] We may even suggest that, in good and effective communication, *mutual listening* is more important than *honest speaking*.[77] Synodality promotes *both*.

2.2.4 — *Synodality means that clericalism must end*

The spirit and practice of synodality leads to the end of clericalism, which is always destructive.[78] We are wise to be careful here: "clergy" and "clericalism" are not synonyms. Clergy promote the life of the Church, but clericalism destroys the life of the Church.

Clergy are those among the People of God who have received holy orders (c. 207 § 1), about whom canon 1008 states: "By divine institution, some of the Christian faithful are marked with an indelible character and constituted as sacred ministers by the sacrament of holy orders. They are thus consecrated and deputed so that, each according to his own grade, they may serve the People of God by a new and specific title."[79] Clergy are a gift within the Church. Through their generous ministry, Christ continues to perform his life-giving salvific mission in very specific ways until his final return in glory.[80]

[76] Put another way: the process is fundamental to the product. See Cardinal C. SCHÖNBORN, O.P., "Relazione commemorativa," in "Commemorazione del 50.mo anniversario del Sinodo dei Vescovi: Introduzione, Relazione commemorativa e comunicazioni," 17 October 2015, http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2015/10/17/0795/01758.html (20 May 2018).

[77] Gerald M. Kicanas says: "the key to a dialogic church is enhanced listening on the part of all." G.M. KICANAS, "Journeying Together," 68.
J.D. Faris reflects: "The emphasis on synodal activity is not on the freedom to express one's opinions, but rather the importance – indeed necessity – to listen to others. Pope Francis describes synodality as listening to one another, listening to the Holy Spirit…. At times the opportunity to listen will find expression in institutions while other *expressions* are processes requiring consultation or consent. We must also keep in mind that listening should never be confined to canonical structures." J.D. FARIS, in "Synods, Councils, and Assemblies: Hierarchical Structures as Expressions of Synodality," 191-192.

[78] Michele Giulio Masciarelli comments: "In una Chiesa sinodale l'autorità serve, l'authoritarismo distrugge…. Nella Chiesa ognuno é servo di Dio e dei fratelli. La sinodalità della Chiesa non ci sarebbe senza la *diakonia*…" M.G. MASCIARELLI, *Un popolo sinodale*, 142, 144.

[79] BENEDICT XVI, apostolic letter *motu proprio Omnium in mentem*, 26 October 2009, in *AAS*, 102 (2001), 8-10; English translation in http://w2.vatican.va/content/benedict-xvi/en/apost_letters/documents/hf_ben-xvi_apl_20091026_codex-iuris-canonici.html (20 May 2018).

[80] Alphonse Borras reflects upon the role of the hierarchy within the synodal Church: "À cet égard, il y a une relation intrinsèque entre la synodalité inhérente à la communion ecclésiale et le ministère pastoral, entre principe synodal et principe hiérarchique. Le principe synodal

Clericalism is the maintaining or increasing of the power of clergy rooted in an unfounded sense of power and entitlement. It is a false and fabricated superiority, often reflective of a vain and base ambition, by which some clergy presume to dominate over and/or to feed off the faithful entrusted to their care.[81] Clericalism does not give life but, like a slow-growing cancer, brings forth increasing pain and hurt, decay and even death. It is *always* destructive. It can be very subtle, especially when a leader is so proudly self-consumed as to believe that "I see more than, or I know better than, those whom I serve." Such clericalism, and the bullying-leadership style which often accompanies it, has no place among the People of God.[82] Clericalism denies that the Spirit also bestows manifold gifts upon lay persons, who constitute the great majority of the Church. In *Evangelii gaudium*, 102, Pope Francis states that excessive clericalism can exclude lay persons from decision-making.

> Lay people are, put simply, the vast majority of the people of God. The minority – ordained ministers – are at their service. There has been a growing awareness of the identity and mission of the laity in the Church. We can count on many lay persons, although still not nearly enough, who have a deeply-rooted sense of community and great fidelity to the tasks of charity, catechesis and the celebration of the faith. At the same time, a clear

figure sacramentellement l'ensemble du Corps ecclésiale. Le principe hiérarchique figure sacramentellement le Christ qui est la Tête grâce à son esprit. Il y a implication mutuelle entre ces deux principes : l'un ne va *pas sans* l'autre. Mais le principe hiérarchique est imbriqué dans le principe synodal dont il est le pôle, précisément *ministériel*, comme d'ailleurs *métaphoriquement* la tête est imbriquée dans le corps." A. BORRAS, "Synods, Councils, and Assemblies: Hierarchical Structures as Expressions of Synodality," 191-192,

[81] During a homily on the occasion of the silver jubilee of Father Ray Romero on 24 June 2017, the Most Reverend Socrates Villegas, president of the Catholic Bishops Conference of the Philippines (CBCP) and Archbishop of Lingayen Dagupan spoke very strongly against clericalism: "The story of a priest cannot be a story from rags to riches … because if the story of a priest is from rags to riches then that priest is a Judas who enriched himself with 30 pieces of silver." N.E. DELACRUZ, "Priests who 'enrich' themselves slammed," in *CBCP News*, 26 June 2017, http://cbcpnews.net/cbcpnews/priests-who-enrich-themselves-slammed/ (18 January 2018).

[82] Cardinal Lorenzo Baldisseri comments: "Dobbiamo ammettere che le nostre comunità parrocchiali non si sono ancora pienamente affrancate da una visione clericalista ereditata dal passato: pastori e laici sono spesso abituati a un esercizio individualista dell'autorità pastorale, incapace di valorizzare il protagonismo di tutti i battezzati, ciascuno dei quali è dotato dallo Spirito Santo di doni e carismi per l'utilità comune. È in questo senso che occorre puntare sugli organismi di partecipazione sorti col concilio Vaticano II e sui quali il Santo Padre ha già più volte richiamato l'attenzione: in primis il consiglio pastorale, diocesano e parrocchiale, nel quale uomini e donne, in rappresentanza di tutti i membri della comunità, coadiuvano i pastori nella programmazione pastorale." L. BALDISSERI, "L'altro nome della Chiesa: Sinodalità e popolo di Dio."

> awareness of this responsibility of the laity, grounded in their baptism and confirmation, does not appear in the same way in all places. In some cases, it is because lay persons have not been given the formation needed to take on important responsibilities. In others, it is because in their particular Churches room has not been made for them to speak and to act, due to an excessive clericalism which keeps them away from decision-making. Even if many are now involved in the lay ministries, this involvement is not reflected in a greater penetration of Christian values in the social, political, and economic sectors. It often remains tied to tasks within the Church, without a real commitment to applying the Gospel to the transformation of society. The formation of the laity and the evangelization of professional and intellectual life represent a significant pastoral challenge.

A few months before *Evangelii gaudium*, on 28 July 2013, in his address to the leadership of the episcopal conferences of Latin America, Pope Francis identified clericalism as a temptation against missionary discipleship.

> *Clericalism* is also a temptation very present in Latin America. Curiously, in the majority of cases, it has to do with a sinful complicity: the priest clericalizes the lay person and the lay person kindly asks to be clericalized, because deep down it is easier. The phenomenon of clericalism explains, in great part, the lack of maturity and Christian freedom in some of the Latin American laity. Either they simply do not grow (the majority), or else they take refuge in forms of ideology like those we have just seen, or in partial and limited ways of belonging. Yet in our countries there does exist a form of freedom of the laity which finds expression in communal experiences: Catholic as community. Here one sees a greater autonomy, which on the whole is a healthy thing, basically expressed through popular piety. The chapter of the Aparecida document on popular piety describes this dimension in detail. The spread of bible study groups, of ecclesial basic communities and of Pastoral Councils is in fact helping to overcome clericalism and to increase lay responsibility.[83]

He added that a self-serving and ambitious clericalism is certainly not to be found in a bishop in the Church, about whose ministry Pope Francis offered his reflections.

> Bishops must lead, which is not the same thing as being authoritarian. As well as pointing to the great figures of the Latin American episcopate, which we all know, I would like to add a few things about the profile of the bishop, which I already presented to the Nuncios at our meeting in Rome. Bishops must be pastors, close to people, fathers and brothers, and gentle, patient, and merciful. Men who love poverty, both interior poverty, as freedom before the Lord, and

[83] FRANCIS, Apostolic Journey to Rio de Janeiro, Address to the Leadership of the Episcopal Conferences of Latin America during the General Coordination Meeting, Sumaré Study Center, 28 July 2013, https://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130728_gmg-celam-rio.html (20 May 2018).

> exterior poverty, as simplicity and austerity of life. Men who do not think and behave like "princes.". Men who are not ambitious, who are married to one church without having their eyes on another. Men capable of watching over the flock entrusted to them and protecting everything that keeps it together: guarding their people out of concern for the dangers which could threaten them, but above all instilling hope: so that light will shine in people's hearts. Men capable of supporting with love and patience God's dealings with his people. The Bishop has to be among his people in three ways: in front of them, pointing the way; among them, keeping them together and preventing them from being scattered; and behind them, ensuring that no one is left behind, but also, and primarily, so that the flock itself can sniff out new paths.[84]

On 19 March 2016, Pope Francis again discussed clericalism in Latin America in a letter to Cardinal Marc Ouelette, p.s.s., president of the Pontifical Commission for Latin America. He called clericalism a "great distortion," which nullifies the character of Christians and undervalues baptismal grace.[85] Almost two years later, on 16 January 2018, Pope Francis referred to this letter in his address to bishops during his apostolic journey to Chile and Peru. In that meeting, he added that clericalism is a "caricature of the vocation we have received." He insisted that we must say "no" to clericalism, also in the formation of future priests who must support and encourage the laity "in a climate of discernment and synodality."[86] *Clericalism is clergy abuse*!

Synodality excises clericalism by underscoring, as Pope Francis says in his jubilee address, that for disciples, "the only authority is the authority of service, the only power is the power of the cross."[87] Secular models of authoritarian service cannot exist among the pilgrim missionary disciples (see *Matthew* 20:25-27). Synodality cannot co-exist with clericalism,[88]

[84] Ibid.

[85] FRANCIS, Letter of His Holiness, Pope Francis, to Cardinal M. Ouelette, President of the Pontifical Commission for Latin America, 19 March 2016, https://w2.vatican.va/content/francesco/en/letters/2016/documents/papa-francesco_20160319_pont-comm-america-latina.html (20 May 2018). See L. CLAVELL, "Il primo levello di sinodalità e l'ascolta della voce dei fedeli laici," in L. BALDISSERI (ed.), *A cinquant'anni dall'Apostolica sollicitudo*, 299-306.

[86] FRANCIS, Apostolic Journey of his Holiness, Pope Francis, to Chile and Peru (15-22 January 2018), Meeting with the Bishops, Greeting of the Holy Father at Santiago Cathedral Sacristy, 16 January 2018, in *Origins*, 47 (2017-2018), 553.

[87] See FRANCIS, "The Pope's Words at the Angelus Prayer, 05.11.2017," http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2017/11/05/171105a.html (20 May 2018). See also J.A. KOMONCHAK, "Theological Perspectives on the Exercise of Synodality," 356.

[88] Gilles Routhier reflects: "La conversion évangélique des relations entre les personnes est au fondement de la vie synodale dans une Église locale. Il s'agit de bien comprendre la fonction pastorale de l'Église et ne jamais sombrer dans le cléricalisme souvent dénoncé par le pape François et qui conduit à isoler les pasteurs de l'ensemble des fidèles." G. ROUTHIER, "La synodalité dans l'Église locale," 702.

which is always evil. Synodality places ministry in perspective as a service among disciples, each of whom has received unique gifts from the Spirit. Ministry ensures ecclesial *communio* in the apostolic Tradition of "one Lord, one faith, one baptism" (*Ephesians* 4:5) or, in the language of the Code, "the communion of … the profession of faith, the sacraments, and ecclesiastical governance" (c. 205).

Conclusion

Synodality is a constitutive element of the Church. It is not optional. It is a divine gift for the disciples. Pope Francis is very serious about synodality. He refers to it repeatedly, and he explains that it is to be operative in all dimensions and at all levels of the life of the Church. Synodality is the constant, Spirit-driven *modus essendi* and *modus agendi* for the Church. It is an engaging and refreshing hermeneutic for the being and the behaving of the Church, for its existence and its evangelization, for its mission and its ministry. Synodality is a new way of thinking. It is also a new way of living as the pilgrim People of God. This new way invites every disciple to share gifts generously, to voice needs and concerns honestly *and without fear*, and especially to listen attentively to the voices of others. Such respectful and open dialogue enables us to address the true pastoral needs of the Church in a transparent way as *we walk together* with Jesus.

Synodality invites systemic change in some aspects of the life of the Church. It enables the pilgrim Church as a *communio* to discern the movement of the Spirit among us, *cum* and *sub* the leadership of those who have the authority of service to preserve the unity of the Church, in accord with the apostolic Tradition. Indeed, synodality provides a fresh model throughout the entire Church in all its interactions and gatherings. Synodality enriches, enhances, and enlivens the entire Church. Synodality focuses on the *journey* of the disciples with Jesus as we accompany each other towards the eternal Kingdom. Because synodality means that we are in the "process of journeying together" or the "process of walking the same path with others," it ensures that no one is excluded and no one is left behind.

Studia canonica 52 | 2018, 45-80
doi: 10.2143/STC.52.1.3285213

THE RELIGIOUS HABIT IN CHURCH LAW FROM 1917 TO THE PRESENT

NANCY BAUER, O.S.B.*

SUMMARY — Many Catholics, at least in some parts of the world, have strong feelings on whether religious should or should not wear a habit. In this paper, the author attempts to set aside all of these sentiments and instead take a dispassionate look at 100 years of church law regarding the religious habit, from the 1917 Code of Canon Law to the present. The study addresses the topic through the following stages: the 1917 legislation; the pontificate of Pope Pius XII; Vatican II and the postconciliar period; the revision of the code and canon 669 of the 1983 code; and the period since the promulgation of the 1983 code. The primary aim of this juridical journey is to arrive at the *ius vigens* regarding the religious habit.

RÉSUMÉ — Dans certaines parties du monde, de nombreux catholiques ont un avis prononcé sur le port, ou non, de l'habit religieux. Dans cet article, l'auteur tente de faire abstraction de ces opinions afin de porter un regard neutre sur la loi de l'Église concernant le port de l'habit religieux, depuis le Code de 1917 jusqu'à nos jours. L'étude aborde le sujet à travers les étapes suivantes : la législation de 1917; le pontificat du pape Pie XII; le Concile Vatican II et la période postconciliaire; la révision du Code de 1983 et de son canon 669; ainsi que la période écoulée depuis la promulgation du Code de 1983. Le but principal de ce parcours juridique est d'arriver à la *ius vigens* en ce qui concerne le port de l'habit religieux.

Introduction

A story from the thirteenth century tells of a dying monk who, overcome by the heat of a fever, begged to have his cowl removed. His request was granted; thus, he died wearing only his scapular.

> The next night, as the monks were reading psalms around the body, the dead monk suddenly sat up and said he was taken by the angels into Paradise;

* Assistant Professor of Canon Law, The Catholic University of America, Washington, D.C.

> St. Benedict came to the door and said, "Who are you?" And when he said he was a monk of the Cistercian Order, St. Benedict said, "Certainly you are not. If you are a monk where is your habit? This is a place for rest, and you are going to enter in your working dress?" The monk was allowed to return to earth and resume his habit so he might attain to the promised state of bliss.[1]

A scholar of the Rule of St. Benedict might point out that the Father of Western Monasticism wrote his prescriptions for monastic clothing long before what came to be known as "the religious habit" had acquired such significance.[2] The purpose of recalling the story here is to demonstrate that, by the High Middle Ages, the specific style of dress adopted by each religious order as it came into existence was not only a matter of practicality and identity, but was permeated with religious meaning and symbolism and, in some cases, was believed to have been dictated in heavenly dreams and visions.[3] Whereas the ancient Desert Fathers and Mothers were said to have fled society to take up a life of asceticism, persons who entered religious life in later generations were said to have "taken the habit." In fact, until the nineteenth century, it was possible to make a tacit rather than

[1] The story was told around 1223 A.D. by Caesarius of Heisterbach in *Dialogus Miraculorum* and is recounted in C. WARR, *Dressing for Heaven: Religious Clothing in Italy, 1215-1545*, Manchester, UK/New York, Manchester University Press, 2010, 59-60.

[2] According to WARR, *Dressing for Heaven,* 58: "The symbolic significance of the habit is particularly evident in writings of the eleventh and twelfth centuries." St. Benedict wrote his Rule in the first half of the sixth century. In chapter 55 on "The Clothing and Footwear of the Monks," he wrote: "The clothing (*vestimenta*) distributed to the brothers should vary according to local conditions and climate, because more is needed in cold regions and less in warmer ….We believe that for each monk a cowl and tunic will suffice in temperate regions; in winter a cowl is necessary, in summer a thinner or worn one; also a scapular for work, and footwear — both sandals and shoes. Monks must not complain about the color or coarseness of all these articles, but use what is available in the vicinity at a reasonable cost." In T. FRY et al. (eds.), *RB1980: The Rule of St. Benedict in Latin and English with Notes*, Collegeville, MN, The Liturgical Press, 1981.

[3] See, for example WARR, *Dressing for Heaven*, 62, 71: Saint Alberic, second abbot of Citeaux, was said to have had a vision of the Blessed Virgin Mary in which she ordered the Cistercians to wear a white habit. Similarly, Mary was said to have appeared to St. Norbert, founder of the Premonstratensians, and prescribed a black tunic with a white cloak. The Dominican habit has been attributed to a vision in which Mary presented Blessed Reginald with a black and white habit.

St. Simon Stock, a thirteenth-century Carmelite prior general, was said to have experienced a vision in which the Blessed Virgin Mary gave him a brown scapular along with this promise: "My beloved son, receive this habit of thy Order. This shall be to thee and to all Carmelites a privilege that whosoever dies clothed in this shall never suffer eternal fire." See E. KUHNS, *The Habit: A History of the Clothing of Catholic Nuns*, New York, Doubleday, 2003, 99.

explicit religious profession by donning the habit and wearing it for a sufficient time.[4]

When the 1917 Code of Canon Law was promulgated, the wearing of a distinctive habit was the most prominent sign that a person was a religious, and the rite of being received into the novitiate was sometimes an elaborate rite of investiture. However, by the 1950s, the style of many habits, especially those of women religious, were deemed anachronistic and unhealthy. Pope Pius XII called for simplification, but the call was not heeded until after Vatican Council II. Then, a number of religious institutes evolved quickly from a modified habit to giving up a distinctive style of dress altogether. Church law regarding the religious habit also evolved.

This study traces a century of ecclesiastical law in the Latin Church regarding the religious habit, from the 1917 code to the present. The paper addresses the 1917 legislation; the pontificate of Pope Pius XII; Vatican II and the post-conciliar period; the revision of the code and the relevant canon of the 1983 Code of Canon Law; and the period since the promulgation of the code. The primary aim of this juridical journey is to arrive at the *ius vigens* regarding the religious habit.

1 — *The 1917 Code of Canon Law*

A number of canons of the 1917 code addressed the religious habit. The general requirement regarding religious dress appeared in canon 596. "All religious must wear the habit of their religious [institute] both inside and outside of the house, unless grave cause excuses [to be assessed], in urgent necessity according to the judgment of the Superior, even a local one.[5]

[4] A. VERMEERSCH, art. "Profession, Religious," in *The Catholic Encyclopedia*, vol. 12, New York, The Gilmary Society, 1911, 452: "Profession was express, when made with the usual ceremonies; tacit, or implied, when the reciprocal engagement between the order and the religious was proved by outward acts; it was sufficient for this purpose to wear the habit of the professed members for some time openly and without objection being made in any one. Pius IX abolished the tacit solemn profession for religious orders (11 June 1858), and it has fallen into disuse altogether." See also KUHNS, *The Habit*, 65-66: "For many monks and nuns of the Middle Ages, the holy habit was their only assertion of religious life; many never took formal vows."

[5] *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, Rome, Typis Polyglottis Vaticanis, 1917, c. 596: "Religiosi omnes proprium suae religionis habitum deferant tum intra tum extra domum, nisi gravis causa excuset, iudicio Superioris maioris aut, urgente necessitate, etiam localis." English translation from E. PEETERS, *The 1917 Pio-Benedictine Code of Canon Law in English Translation with*

Other canons included the following prescriptions: receiving the habit marked the beginning of the novitiate, unless the constitutions of a religious institute prescribed otherwise;[6] the habit was to be worn throughout the novitiate, unless special local circumstances called for an exception;[7] postulants were to wear modest attire but not the habit of novices;[8] religious on exclaustration were not to wear the habit outside the institute;[9] and those who departed permanently were not to wear it at all.[10] A new religious institute was required to design a habit that was not already worn by another institute.[11]

Canon 596 on the general obligation of wearing the habit extended to members of societies of common life, unless their constitutions stated otherwise.[12] Members of societies were also bound by the common obligations of clerics, "unless by the nature of the thing or the context of the words it appears otherwise."[13] Thus, even if the constitutions of their society did not prescribe a habit, clerical members of societies of men were required to wear "a decent ecclesiastical habit, according to the customs of the place or the prescriptions of the local Ordinary."[14]

The obligation mentioned in canon 596 was not that every religious institute have a habit; rather, the norm focused on when and where individual members were to wear the habit. One could argue that the canon presumed all institutes had habits, but canonists pointed out that some did not. Clerics who were members of institutes without a proper habit were obliged to wear the ecclesiastical garb of the region.[15] Lay brothers of clerical institutes

Extensive Scholarly Apparatus, San Francisco, Ignatius Press, 2001. All subsequent English translations of the canons of *CIC/17* are from this source.

6 *CIC/17*, c. 553.

7 *CIC/17*, c. 557.

8 *CIC/17*, c. 540 §2.

9 *CIC/17*, c. 639.

10 *CIC/17*, c. 640 §1, 1°. Those who were expelled immediately due to "grave exterior scandal" or "imminent harm of the worst sort to the community" were also forbidden to wear the habit (c. 653).

11 *CIC/17*, c. 492 §3.

12 *CIC/17*, c. 679 §1. In the 1983 code, these societies are called societies of apostolic life.

13 *CIC/17*, c. 679 §1.

14 *CIC/17*, c. 136 §1.

15 By canon 592, clerical religious were bound by canon 136 which stipulated that all clerics must wear a decent ecclesiastical habit. U. BESTE, *Introductio in Codicem*, 3rd ed., Collegeville, MN, St. John's Abbey Press, 1946, 410-411, identified the Theatines, Barnabites, and Jesuits as religious who wore clerical garb. See also F. X. WERNZ and P. P. VIDAL, *Ius Canonicum: Codicis normam exactum, tomus III, De religiosis*, Rome, Apud Aedes Universitatis Gregorianae, 1933, 382; and P. T. SCHÄFER, *De Religiosis ad normam Codicis Iuris Canonici*, 4th ed.,

without habits were obligated by the provisions in their constitutions.[16] There were also approved congregations of sisters that, from their origin, did not have habits.[17]

The canons did not specify what constituted a habit for men or for women. Such details were to be incorporated into the constitutions of each institute. However, canonical tradition and, in particular, norms issued by the Congregation for Bishops and Regulars in 1901 provided guidelines. "The material, form, arrangement, and color of the habit is to correspond to the dignity, gravity, and modesty of religious, and to the virtue of poverty."[18] Religious clothing was not to be made of silk, and religious were not to wear gold or silver ornamentations or anything that indicated vanity, prompted ridicule, or disedified other people; a small, simple cross or medal was permitted.[19] The habit of members of the first class could be distinct from that of other classes and, for sisters, the habit of the professed could be distinct from that of novices.[20] The exact form of the habit was to be described in the constitutions and not changed without express permission of the Holy See.[21]

The 1917 canons were strictly juridical and did not attach any spiritual significance or particular purpose to the wearing of a habit, but canonists

Rome, Typis Polyglottis Vaticanis, 1947, 680, who noted that Ignatius, Philip Neri, and Vincent de Paul prescribed clerical dress rather than religious habits. Philip Neri's Congregation of the Oratory and Vincent de Paul's Congregation of the Mission are societies of apostolic life, referred to as societies of common life under the 1917 code.

16 Camillus De Carlo, *Jus religiosorum*, Tournai, Desclée & Co, 1950, 293.

17 For example, the Society of the Daughters of the Heart of Mary, founded in 1791 in France by Jesuit Father Pierre Joseph de Clorivière and Marie Adélaïde de Cicé, had no habits and no cloister so the members could "serve the poor by all kinds of apostolic works." A brief history of the institute can be found at http://www.sfcminternational.org/ENG/index.php?option=com_content&view= article&id=61&Itemid=56&lang=es.

18 Congregation for Bishops and Regulars, *Normae secundum quas S. Congr. Episcoporum et Regularium procedere solet in approbandis novis Institutis votorum simpliciuim* 66, 28 June 1901. "Habitus materia, forma, dispositio, color tales sint, ut tum religiosae dignitati, gravitati et modestiae, tum etiam virtuti paupertatis conveniant." In "Appendix II," Schäfer, *De religiosis*, 1110.

19 Congregation for Bishops and Regulars, *Normae* 67; Schäfer, *De religiosis*, 1110. Although the *Normae* did not mention rings, it was and still is the custom of many religious institutes of women to wear a ring symbolizing the mystical espousal to Christ and membership in a particular religious institute. See, for example, De Carlo, *Jus religiosorum*, 292.

20 Congregation for Bishops and Regulars, *Normae* 68; Schäfer, *De religiosis*, 1110. In many cases, the primary difference between the habit of novices and that of professed members was the color of the veil. For example, in institutes with black habits, novices often wore white veils.

21 Congregation for Bishops and Regulars, *Normae* 69-70; Schäfer, *De religiosis*, 1111.

drew on tradition to address its importance. According to Schäfer, the habit was a sign of the religious state and a reminder of one's vocation: "This is true: The habit does not make the monk, but this is also true: Keep the habit and the habit will keep you."[22] According to Creusen, the wearing of one's habit was a privilege: it "indicates to all the dignity of the profession" and, for the individual religious, it is "at once an incentive to irreproachable conduct and a safeguard of his virtue."[23] Ramstein regarded the habit as an "external mark of deference and respect." Just as the respect owed by the faithful to clerics was better secured through the wearing of clerical garb, the respect owed to religious was promoted by the religious habit.[24] Geser explained why a religious sister wore clothing different from people in the world. "She does so to indicate that she has left the world. The habit should also remind the sister of her duties as a religious."[25]

Particular law sometimes provided norms for occasions when the religious habit should not be worn in public. "In the United States and other countries where the Catholics are scattered among a large non-Catholic population, particular laws provide that priests and religious shall not wear the cassock or the religious habit in public. For the United States, the Third Plenary Council of Baltimore prescribes the manner in which the secular clergy and the religious men should be clothed when they go out."[26] The

[22] SCHÄFER, *De religiosis*, 680-681: "Hoc quidem verum est: Monachum non facit habitus, sed illud quoque valet: Servate habitum et habitus vos servabit." BESTE, *Introductio in Codicem*, 410, also quoted the second of these two familiar axioms.

[23] J. CREUSEN, *Religious Men and Women in Church Law*, 6th Eng. ed., A. ELLIS (ed.), Milwaukee, The Bruce Publishing Company, 1958, 202.

[24] M. RAMSTEIN, *A Manual of Canon Law*, Hoboken, NJ, Terminal Printing and Publishing, 1947, 361-362. Of course, others point out that religious habits have also been the object of ridicule. See, for example, KUHNS, *The Habit*, 9: "Nuns in habits are irresistible subjects for journalists and advertisers, and this representation has become both piously saccharine and crassly kitsch at the same time. Cultural historian Jessica Matthews notes, 'Items that can be found in specialty gift shops include nun squeaky toys, nun candles, nun puppets, nun lunchboxes, nun Halloween costumes, windup jumping nuns, strings of nun lights, postcards, comic books (*Warrior Nun Areala*), dolls, bookends, and coffee mugs that say "It's a bad HABIT."' Additionally, the Internet teems with pornographic nun-related merchandise."

[25] F. GESER, *The Canon Law Governing Communities of Sisters*, St. Louis, MO, B. Herder Book Co., 1938, 297.

[26] S. WOYWOD, *A Practical Commentary on the Code of Canon Law, Combined volumes I & II*, rev. by C. SMITH, New York, Joseph F. Wagner, 1957, 283-284. See also, RAMSTEIN, *A Manual of Canon Law*, 362: "In the United States religious men do not wear the habit outside the house and church, and this in virtue of the III Plenary Council of Baltimore, n. 77." According to the Third Plenary Council of Baltimore, held in 1884, religious priests who did not wear their proper habit outside their religious houses were to wear the Roman

Holy See also granted indults that permitted religious to wear secular clothing in certain circumstances. In a 1948 rescript, the Congregation for Religious permitted sisters who taught in public schools in North Dakota to wear secular clothing in response to a state "anti-garb law."[27] Canonical commentaries provided other examples of "grave causes" and "urgent necessities" for which superiors could excuse members from wearing the habit. Sisters who worked in hospitals could wear the required medical attire in lieu of habits.[28] Religious in missionary territories could adapt their clothing to the climate. "On days when the mercury occasionally shows more than 100 degrees, the contrary custom may be adopted without misgiving."[29] Canonists generally agreed that the obligation to wear the habit within the religious house did not extend to sleeping in the habit, unless the constitutions said otherwise.[30] Exposure to anti-Catholic sentiment, war or persecution were mentioned as reasons for setting the habit aside.[31] However, canonists also warned that the desire to be free to mingle in the world or to visit profane or inappropriate places were not legitimate reasons for discarding the habit.[32]

collar or clothing that distinguished them from lay persons. *Decreta Concilii* 77, in *Acta et Decreta Concilii Plenarii Baltimorensis Tertii*, Baltimore, Typis Joannis Murphy et Sociorum, 1884, 41: "Sacerdotes quoque regulares tenentur lege utendi vel collari romano vel vestitu idonea ad distinguendum clericos a laicis, quotiescumque seposito habitu sui ordinis proprio foras prodeunt."

27 L. GRATHWOHL, "The North Dakota Anti-Garb Law: Constitutional Conflict and Religious Strife," in *Great Plains Quarterly*, 13/3 (Summer 1993), 195. According to Grathwohl, the anti-garb law was the initiative of non-Catholics in North Dakota who feared that the wearing of the religious habit on the part of sisters who taught in public schools amounted to proselytization of students, in violation of constitutional separation of Church and state. At the time the law was passed, about seventy-five sisters from several religious orders taught in the state's district schools. Bishop Vincent J. Ryan, Bismarck, sought the rescript from the Holy See and, when it was granted, he and other bishops of the region urged the sisters to use it and remain teaching in the public schools. The sisters who did so wore secular clothing on weekdays and returned to their religious habits on weekends. Their decision to forego the habit while teaching was described as courageous and a great sacrifice.

28 WOYWOD, *A Practical Commentary*, 284.

29 C. AUGUSTINE, *A Commentary on the New Code of Canon Law*, vol. 3, *Religious and Laymen (Can. 487-725)*, St. Louis, MO, B. Herder Book Co., 1929, 596.

30 See, for example, SCHÄFER, *De religiosis*, 545, and DE CARLO, *Ius religiosorum*, 779.

31 See, for example, BESTE, *Introductio in Codicem*, 411; DE CARLO, *Ius religiosorum*, 293; and L. G. FANFANI and K. D. O'ROURKE, *Canon Law for Religious Women*, Dubuque, IA, The Priory Press, 1961, 244.

32 See, for example, BESTE, *Introductio in Codicem*, 411; SCHÄFER, *De religiosis,* 545; DE CARLO, *Ius religiosorum,* 293; G. COCCHI, *Commentarium in Codicem Iuris Canonici ad usum scholarum*, *Liber II. De personis, Pars secunda, De religiosis*, Turin, Casa Editrice Marietti, 1931, 196; and WERNZ and VIDAL, *Ius Canonicum*, 382.

In accord with canon 553, the habit was usually given during the rite in which postulants were received into the novitiate, but canonists noted that this was not required for validity.[33] Some institutes of women had elaborate ceremonies in which the postulants, destined to be espoused to Christ, processed into church dressed in bridal gowns and veils. They received the habit and were escorted from the church to have their hair shorn and to be dressed in full religious garb before returning to the church for the remainder of the liturgy.

To summarize, the 1917 Code of Canon Law required religious to wear the habit proper to their institute both inside and outside the religious house, with prudent exceptions in individual cases, based on the judgment of a major or local superior. The style of a habit was a matter for each institute to determine; ecclesiastical approval came in the form of approval of the institute's constitutions, in which the habit was described. Each new institute was to have a distinct habit. Individual members usually received the habit at the time they were received into the novitiate, but this was not required for the validity of the novitiate. Some institutes, both of men and of women, did not have a proper habit and clerical members of institutes without habits were required to wear ecclesiastical garb.

2 — *Pope Pius XII and the Call for* Accommodata Renovatio

Most habits worn by religious in the middle of the twentieth century had their origins in the everyday clothing of the peasants and poorer classes of earlier centuries. The tunics and cowls of male religious orders were adaptations of clothing worn by peasants before it became common for men to wear trousers.[34] Clerical orders founded in more recent centuries adopted the

[33] SCHÄFER, *De religiosis*, 395. See also CREUSEN, *Religious Men and Women in Church Law*, 151: "The *ceremony* is not at all essential to the taking of the habit; yet the giving of the habit necessarily means admission to the novitiate. Finally, the taking of the habit is not requisite for the *validity* of admission."

[34] For a brief history of the origins of religious habits, see C. W. CURRIER, *History of Religious Orders: A Compendium and Popular Sketch of the Rise and Progress of the Principal Monastic, Canonical, Military, Mendicant, and Clerical Orders and Congregations of the Eastern and Western Churches, Together with A Brief History of the Catholic Church in Relation to Religious Orders*, New York, P. Murphy & Son, 1914, 46-48: "In the beginning, the monks possessed no distinctive habit, and their founders gave them only the costume worn by the peasantry …. In the West, the only mark in the habit to distinguish monks from seculars consisted in the material, which was coarse. Fleury says that St. Benedict gave no other habit to his disciples but that of the peasantry. This holy founder himself received from

garb worn by secular clerics.[35] The habits of nuns and sisters were often styled after the clothing of local peasant women or widows.[36] For example, the iconic white cornette of the Daughters of Charity, a society of apostolic life, was the typical headdress of seventeenth century rural women in France.[37] However, while secular fashions changed, religious retained their traditional dress, with few modifications. Furthermore, the requirement that each new congregation design a distinctive habit resulted in creative developments. It should not be surprising that, by the 1940s and 1950s, some habits were regarded as outdated or outlandish.

It was Pope Pius XII (1939-1958) who first called for *accommodata renovatio* of religious life, a renewal of the spirit and intentions of the founder of each institute along with appropriate adaptation to modern times.[38] Among the pope's concerns were the decline in the number of young people choosing religious life and the effectiveness of religious in their apostolic works. He was particularly concerned that women religious were not always adequately trained to carry out the works to which they were dedicated and that their habits were outmoded and sometimes unhealthy. In allocutions to

the hands of St. Romanus a habit of skins with which he clothed himself in the desert of Subiaco. It also appears that he gave a similar habit to his disciples before he had written his rule. It is probable that, at this period, sheep-skins were the ordinary dress of the shepherds and the mountain peasantry, as well in the East as in the West. When the early founders of monastic orders had written their rules, they prescribed habits similar to those of the poorer classes. It was about this time that cowls with hoods became common among the monks. Utility brought them forth, as they were found to be very convenient in cold weather …. St. Francis gave to his friars the ordinary dress of the peasantry as St. Benedict had done, while the white habit of the Dominicans and that of the Trinitarians owe their origin to a revelation." Currier notes that canons regular fashioned their habits after the dress of secular clergy; canons and canonesses wore surplices.

35 Ibid., 48. According to the Constitutions of the Society of Jesus and their Declarations, composed by St. Ignatius of Loyola, the clothing of members of the society should have three characteristics: first, it should be proper; second, conformed to the usage of the region where one is living (or at least not altogether different); and third, not contradictory to the poverty professed by the order. *Saint Ignatius of Loyola: The Constitutions of the Society of Jesus* 4.2.577-578, translated, with introduction and commentary by G. E. GANS, St. Louis, The Institute of Jesuit Resources, 1970, 258.

36 The original dress of the Sisters of St. Joseph, founded in the mid-seventeenth century in France by Father Jean-Pierre Médaille, consisted of the style of dress and headdress of local widows along with a cross on a chain. M. VACHER, *Nuns without Cloister: Sisters of St. Joseph in the Seventeenth and Eighteenth Centuries*, Lanham, MD, University Press of America, Inc., 2010, 233-234.

37 KUHNS, *The Habit*, 110.

38 For a summary of Pope Pius XII's call for *accommodata renovatio*, see N. BAUER, *Benedictine Monasticism and the Canonical Obligation of Common Life*, Canon Law Studies 561, Washington, DC, The Catholic University of America, 2003, 309-337.

gatherings of women religious, Pope Pius XII urged simplification of habits. In 1951, addressing a meeting of teaching sisters, he said: "Select [a habit] of such a kind that it will be an expression of the inner character, of religious simplicity and modesty; then it will be a source of edification for all, even for modern youth."[39] In 1952, he addressed the first gathering of superiors of women's institutes and congregations. "The religious habit should always express consecration to Christ; that is what everyone expects and desires. For the rest, let the habit be suitable and meet the requirements of hygiene."[40]

The Sacred Congregation for Religious joined Pope Pius XII in his efforts to encourage religious institutes to simplify their habits and abandon customs that no longer served a meaningful purpose. In December 1950, the congregation assembled the first international congress on the states of perfection. The purpose of the gathering in Rome was to study and discuss the status and condition of the states of perfection in light of the changed conditions of the world and the pressing needs of the apostolate.[41] Although the delegates were from male religious and secular institutes and societies of common life, they made numerous observations and suggestions regarding women religious, including their habits. Some suggested that religious abandon the habit altogether, but most called for simplification.[42] One delegate was particularly descriptive in expressing his opinion on sisters' habits.

> In general, the people love simplicity and practicality. They want the habit of those consecrated to God to be serious but not eccentric, clean but not

[39] PIUS XII, apostolic exhortation *Iis quae interfuerunt conventui internationali monialium puellis educandis addictarum romae habito*, 13 September 1951, in *AAS*, 43 (1951), 741: "L'abito religioso; sceglietelo tale, che sia l'espressione della interna naturalezza, della semplicità e della modestia religiosa; allora esso sarà di edificazione a tutti, anche alla gioventù moderna." English translation in G. COURTOIS (ed.), *The States of Perfection according to the Teaching of the Church: Papal Documents from Leo XIII to Pius XII*, Westminster, MD, The Newman Press, 1961, 198.

[40] PIUS XII, allocution *Ad Moderatrices supremas Ordinum ac Institutorum religiosarum ob conventum internationalem, a Sacra Congregatione de Religiosis promotum, Romae coadunatas*, 15 September 1952, in *AAS*, 44 (1952), 825: "L'habit religieux doit toujours exprimer la consécration au Christ; c'est cela que tous attendent et désirent. Pour le reste, que l'habit soit convenable et réponde aux exigences de l'hygiène." COURTOIS, *The States of Perfection*, 216.

[41] PIUS XII, allocution, 8 December 1950, in *AAS*, 43 (1951), 27. English translation in *CLD*, vol. 3, 120.

[42] Bernard Kelly, C.S.Sp. suggested that an example of adaptation could include "wearing or not wearing a distinctive dress." SACRED CONGREGATION FOR RELIGIOUS, *Acta et documenta Congressus generalis de statibus perfectionis*, 4 vols., Rome, Typis Piae Societatis S. Pauli, 1952, 1/204. Thomas Brophy, S.I. suggested the works of institutes without habits, such as the Daughters of the Heart of Mary, might be expanded: "They reach people and quarters inaccessible to other sisters. Perhaps other societies already in existence, whose Rule calls for similar works, could be amended to allow their subjects similar liberty of dress when

> lavish. They cannot comprehend some of today's outfits. For example: the sisters. There are hundreds and hundreds of different types, which doesn't matter as long as they are useful. But the eccentricity and, at times, the awkwardness of their headgear is incomprehensible. No one understands the purpose of all those meters of cloth in folds and pleats, of the starched cloth that makes the imprisoned face look like a mask, of those bulky and ridiculous headdresses. If a Vincenzina enters a crowded tram, those nearby can hardly avoid swearing, or at least thinking about it. You would think a long habit and a veil on the head would be much more convenient.[43]

Most delegates who addressed the topic of the habit suggested a common sense approach. "The religious habit publicly manifests separation from the world which specifies, at least in spirit, the religious state. Other than in absolutely exceptional or temporary cases, no one thinks to suppress the habit; here or there, however, especially among nuns, to simplify the habit to make it poorer, less anachronistic, and, in mission countries, better adapted to local circumstances or climate."[44]

the habit would be a hindrance." *Acta et documenta*, 2/156. Bishop Alfred Ancel, former superior general of the Prado Fathers and auxiliary bishop of Lyon, did not favor abandoning the habit unless there was some imperative apostolic reason to do so, but advocated modifications for purposes of health, to avoid "ridiculousness," and so as not to deter vocations. Above all, he noted that religious habits should more effectively reflect the vow of poverty: "Obviously, poverty requires renouncing all luxury and elegance in clothing. In women especially, there is a coquetry and a love of elegance which finds satisfaction even in religious clothing." ("Évidemment, la pauvreté exige qu'on renonce à tout luxe et à l'élégance dans le vêtement. Chez les femmes surtout, il y a une coquetterie et un amour de l'élégance qui trouvent leur satisfaction jusque dans le vêtement religieux.") *Acta et documenta Congressus generalis*, 1/381. Idesbaldus Van Houtryve, O.S.B. called for a study of simplification of nuns' habits, especially for those engaged in manual labor. *Acta et documenta Congressus generalis*, 1/464.

43 G. AMORTH, "Alcuni punti di rinnovamento," in *Acta et documenta Congressus generalis*, 1/308-309: "In generale la gente ama la semplicità, la praticità. Vuole che l'abito della persona consacrata a Dio sia serio, ma non eccentrico, pulito ma non fastoso. Come vuole semplice e pulita la persona che lo indossa. Perciò non comprende oggi certi abbigliamenti. Ad esempio: le suore. Che ce ne siano centinaia e centinaia di tipi diversi, non interessa, purchè si rendano utili. Ma l'eccentricità e talora la goffaggine delle loro acconciature è davvero incomprehensibile. Non si sa che cosa ci stiano a fare tutti quei metri di stoffa in pieghe e pieghette, quelle tele inamidate che rendono simile ad una maschera le facce imprigionate, e quei copricapi ingombranti e ridicoli. Se una Vincenzina entra in un tram affollato difficilmente può evitare le imprecazioni del prossimo, almeno pensate. Un abito lungo e un velo in testa si pensa che sarebbero molto più convenienti."

44 A. PLES, O.P., *Acta et documenta Congressus generalis*, 2/144: "L'habit religieux manifeste publiquement la séparation du monde qui spécifie, à tout le moins en esprit, l'état religieux. Sauf des cas tout à fait exceptionnels ou provisoires, personne ne songe à le supprimer; ici ou là cependant, surtout chez les religieuses, on a simplifié l'habit pour le rendre plus

At the conclusion of the gathering, Arcadio Larraona, secretary of the Congregation for Religious, recalled that constitutions had last been approved in the 1920s, and the Holy See would now allow for various adaptations, including modification of religious habits.[45]

At least one missionary sister enthusiastically endorsed the recommendation that habits be simplified. In response to articles on the habit in a journal for religious, she wrote:

> Dear Father, many, very many of us are one hundred per cent in agreement with you. Please keep pushing, pushing, pushing and talking, talking, talking until results are obtained. It isn't our fault that we must wear the ridiculously conspicuous and unsuitable outfits we do. We would be eternally grateful to you if you could do anything to hasten our release from these swaddling bands, this encasement of the face, the starch, ruffles, pleats, quantity of cloth, number of articles of clothing, the many pins which relentlessly stick our fingers and neck, the dangling, rustling rosary which catches into everything, gets caught in train and bus seats, and is forever breaking into a dozen pieces and constantly in the repair shop. The Blessed Mother did not make herself conspicuous by adopting a singular mode of dress; she conformed to the style of her day. Religious men when working wear suitable clothes, and neither do they have their heads all bundled up. Give me a habit which is extremely simple, suitable in color and for work, and something that can be thrown into a washing machine and washed at least once a week the way common sense and decency demand. Deliver me from this intricate and unwieldy headdress whose weight and pressure cause so many headaches, eye troubles, sinus troubles, and many nervous troubles as well as adverse comments.[46]

Despite this sister's plea and the urging of Pope Pius XII, the Congregation for Religious, and the delegates at the 1950 congress on the states of perfection, few religious institutes heeded the call to modify their habits. A little more than a decade after these events, the call of Vatican II for modification of habits would have dramatically different results.

pauvre, moins anachronique, et, dans les pays de mission, mieux adapté aux circonstances locales ou aux exigences du climat."

45 A. LARRAONA, "Government of Religious Women," *CLD*, vol. 4, 193-195.

46 "A communication from a sister on the missions" was included in the "Questions and Answers" section of *Review for Religious*, 16 (1957), 376, in which Father Joseph Gallen, S.J. responded to the question, "Why has the *Review for Religious* emphasized so frequently the simplification of the habit of religious women?" It also appears in *Questions on Religious Life Compiled from Review for Religious, 1942-1961*, St. Marys, KS, Review for Religious, 1964, 9-10.

3 — *The Conciliar and Postconciliar Period*

Responding to the invitation by the Antepreparatory Commission to submit topics for discussion at the Second Vatican Council, bishops from dioceses across the globe recommended that renewal of religious life appear on the agenda. Among specific topics related to religious life, simplification of the habit was mentioned more frequently than any other. Bishops from at least sixty dioceses called for modification, especially on the part of women religious who were active in the apostolate. The countries represented by these bishops included Poland, France, Germany, Belgium, Italy, Spain, Holland, Brazil, Ecuador, Guatemala, Uruguay, Mexico, Colombia, Peru, Panama, Argentina, Guinea, Niger, Mozambique, and the United States.[47] These countries span Europe, Africa, South America, and North America, so the desire for change regarding the religious habit clearly was universal.

Recommendations of individual bishops reflected the thoughts of those who commented on religious garb during the pontificate of Pope Pius XII. A number of bishops advocated habits that better expressed the vow of poverty. For example, four bishops from Brazil suggested that vocations would increase if habits conformed to poverty and hygiene.[48] Others complained of habits that were "too exquisite and aroused laughter,"[49] were "incommodious and very unique,"[50] or "ridiculous and unreasonable."[51] The apostolic prefect of Misurata, Libya, recommended that women religious abandon their headdresses and adopt simpler forms.[52] A Spanish bishop suggested that new congregations of women founded in the future should all

[47] SECOND VATICAN COUNCIL, *Acta et documenta Concilio oecumenico Vaticano II apparando*, Series 1 (*Antepraeparatoria*), Appendix, vol. 2, pars 1, Vatican City, Typis Polyglottis Vaticanis, 1961, 730-732.

[48] See, for example, the comments of four bishops of the Ecclesiastical Province of Rivi Nigri in Brazil in *Acta et documenta*, Series 1 (*Antepraeparatoria*) vol. 2, pars 7, no. 18, 243.

[49] S. CZAJKA, *Acta et documenta*, Series 1 (*Antepraeparatoria*) vol. 2, pars. 2, 693: "Harum enim vestis nimis exquisita est et quandoque risum excitat." Czajka was auxiliary bishop of the Polish Archdiocese of Częstochowa.

[50] L. SHEHAN, *Acta et documenta*, Series 1 (*Antepraeparatoria*) vol. 2, pars 6, 286: "Habitus valde incommodi et nimis singulares remaneant." Shehan was bishop of Bridgeport, CT, in the United States.

[51] C. A. PEREIRA, *Acta et documenta*, Series 1 (*Antepraeparatoria*) vol. 2, pars 5, 333: "Sunt enim quaedam ridicula et importuna." Pereira was auxiliary bishop and then archbishop of Lourenço Marques, Mozambique.

[52] G. A. PREVITALI, *Acta et documenta*, Series I (*Antepraeparatoria*) vol. 2, pars 5, 279. Previtali, a Franciscan, was apostolic prefect and later bishop of Misurata, Libya.

have a common habit that combines simplicity with gravity; each institute would add an individualized emblem.[53]

When the Preparatory Commission drafted the first schema on the states of perfection for review by the council fathers, the section on the habit combined the norm of canon 596 of the 1917 Code of Canon Law, the recommendations of Pope Pius XII and his contemporaries, and the antepreparatory comments. Articles 33-35 of the 1963 schema *De statibus perfectionis adquirendae* addressed the honor due to the habit; qualities of the habit and the obligation of wearing the habit:

> 33. [On the honor due to the religious habit]. The religious habit, whether of men or women, is a sign of personal consecration, of separation from the world, and of holiness of life and is to be worn with fidelity and dignity as something sacred and is to be held in honor by all.
>
> 34. [Qualities of the religious habit]. The habit is to be simple, modest, poor and at the same time decent, meeting the requirements of health, suited to circumstances of time and place and the needs of ministry. Habits that, in the judgment of the Holy See, do not meet these norms, are to be changed.
>
> 35. [The obligation of wearing the religious habit]. Religious have the general obligation of wearing the habit of their institute both inside and outside the house unless, without prejudice to the right of local ordinaries, the major superior, for a grave cause, determines otherwise for outside the house.[54]

Despite the numerous comments on the religious habit submitted during the antepreparatory phase, there were few interventions on the topic during the actual celebration of the council. No doubt, they saw that the schema had incorporated the concerns they had expressed in the earlier phase, particularly regarding the qualities of the habit. In general, those who intervened called for

[53] L. C. LACOMA, *Acta et documenta*, Series I (*Antepraeparatoria*) vol. 2, pars 2, 424. At the time of the council, Lacoma was auxiliary bishop of Tarragona, Spain, and in 1964 was named bishop of Sigüenza-Guadalajara.

[54] *Schema Constitutionis de statibus perfectionis adquirendae* 33-35, in SECOND VATICAN COUNCIL, *Acta synodalia sacrosancti Concilii oecumenici Vaticani II*, vol. 3 (Periodus tertia) pars 7, Vatican City, Typis Polyglottis Vaticanis, 1975, 774-775: "33. [*De honore habitui religioso debito*]. Habitus religiosus, sive virorum sive mulierum, cum personae consecrationem, separationem a mundo et vitae sanctitatem significet, ut quid sacrum fideliter et digne est deferendus atque ab omnibus in honore habendus." 34. [*Qualitates habitus religiosi*]. Sit autem simplex ac modestus, pauper simul et decens, valetudinis postulatis consentaneus et temporum locorumque adiunctis necnon ministerii necessitatibus accommodatus. Etiam habitus iam existentes, si his normis, iudicio Sanctae Sedis, non congruant, immutandi sunt. 3. [*Obligatio deferendi habitum religiosum*]. *Religiosi generali obligatione tenentur sui instituti habitum tum intra tum extra domum deferendi, nisi salvo iure Ordinariorum locorum, Superiores Maiores gravi de causa de habitu extra domum gerendo aliter statuerint*."

greater freedom in deciding to forego the habit in certain circumstances.[55] One practical-minded council father recommended that nuns who drive motorcycles or automobiles should have suitable habits to prevent accidents.[56]

The schema on the states of perfection was greatly reduced in length, and the final approved decree on the renewal of religious life *Perfectae caritatis* contained a single article on the habit. "The religious habit, a sign of consecration, is to be simple and modest, poor and at the same time decent, suited to the requirements of health and to the circumstances of time and place, and accommodated to the needs of ministry. A habit, whether of men or women, that, in the judgment of the Holy See, does not meet these norms, is to be changed."[57]

Article 17 of *Perfectae caritatis* retained nothing from canon 596. Rather, it ascribed a spiritual purpose to the habit, that is, it is a sign of consecration, and it prescribed the desired qualities of a habit: simple, modest, poor, decent, adaptable, and practical. Given that few institutes heeded the earlier calls for modification of habits, it is unlikely that the council fathers envisioned how eagerly religious would respond to article 17. However, at least one early commentator on the decree predicted the revolution. "The rapid changes of our times are likely … to bring about much greater changes than most people imagine."[58]

The end of the council marked the beginning of a period *ad experimentum* for religious. Pope Paul VI issued norms for implementing *Perfectae caritatis* in the second part of his 1966 apostolic letter *Ecclesiae sanctae*. He urged religious to "effect the renewal and adaptation of their way of life and of their discipline, acting prudently but, at the same time, with energy."[59]

[55] It was suggested that teaching sisters in some locations not be obliged to wear habits, that the decision to permit secular clothing require only a reasonable cause rather than a grave cause, and that habits need not always be worn within the house of an institute. *Acta Synodalia*, vol. 3, pars 7, 126-127.

[56] Ibid., 126.

[57] SECOND VATICAN COUNCIL, decree *Perfectae caritatis* 17, 28 October 1965, in *AAS*, 58 (1966), 710: "Habitus religiosus, utpote signum consecrationis, sit simplex ac modestus, pauper simul et decens, insuper valetudinis requisitis consentaneus et temporum locorumque adiunctis necnon ministerii necessitatibus accommodatus. Habitus autem tam virorum quam mulierum, qui iis normis non congruit, immutandus est."

[58] F. WULF, "Decree on the Appropriate Renewal of the Religious Life," in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, vol. 2, New York, Herder and Herder, 1968, 367.

[59] PAUL VI, apostolic constitution *Ecclesae sanctae II*, introduction, 6 August 1966, in *AAS*, 58 (1966), 775: "Instituta religiosa ... oportet spiritus novitatem imprimis promoveant indeque vitae et disciplinae accommodatam renovationem prudenter quidem sed sollerter perficere current." English translation in A. FLANNERY (gen. ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents*, vol. 1, new rev. ed., Northport, NY, Costello Publishing Company, 1975, 624.

He assigned the task of renewal to the institutes themselves, primarily through general chapters,[60] giving them the right to revise prescripts of their constitutions by way of experiment, even experiments contrary to common law.[61] While he did not mention habits explicitly, the criteria for renewal and adaptation included the following: "Those elements are to be considered obsolete which do not pertain to the nature and purpose of the institute and which, having lost their meaning and impact, are of no further assistance to religious life."[62] In 1971, Pope Paul VI issued an apostolic exhortation on the renewal of religious life according to the teaching of the Second Vatican Council. In *Evangelica testificatio*, he addressed the subject of the habit in the context of the evangelical counsel of poverty. "While we recognize that certain situations can justify the abandonment of a religious type of dress, we feel bound to say that it is fitting that the dress of religious men and women should be, as the Council wishes, a sign of their consecration and that it should be in some way different from the forms that are clearly secular."[63]

As soon as religious institutes undertook the task of renewal *ad experimentum*, the Sacred Congregation for Religious began to express caution about the changes some of them were making in their manner of dress. As early as 1966, the cardinal prefect of the congregation, in an address to superiors of women's institutes, presented some thoughts on "new models for the clothing of Sisters and religious" that had been brought to his attention.[64]

> Various persons have recently written to me lamenting the fact that here and there changes have been introduced which have caused surprise and wonderment. Some of the models presented have very little of the religious about them.
>
> The austere and dignified character of the religious habit must be preserved, because it is a sign of consecration to God. The veil should be kept if it is

[60] *ES II* 1, *AAS*, 58 (1966), 77; *Flannery1*, 624.

[61] *ES II* 6, *AAS*, 58 (1966), 776; *Flannery1*, 625.

[62] *ES II* 17, *AAS*, 58 (1966), 778: Obsoleta reputanda sunt quae naturam et fines Instituti non constituunt atque, significatione et vi sua amissa, vitam religiosam revera iam non adiuvant." In *Flannery1*, 627-628.

[63] Paul VI, apostolic exhortation *Evangelica testificatio* 22, 29 June 1971, in *AAS*, 63 (1971), 509: "Quibusdam in rerum adiunctis — id agnoscimus quidem — probari potest formam vestis religiosae deponi; tamen silentio praeterire nequimus, quantopere conveniat, ut habitus religiosorum religiosarumque sit, quemadmodum Concilium voluit, signum consecrationis eorum, atque a formis aperte saecularibus quadamtenus distinguatur." In *Flannery1*, 691.

[64] "Allocutio Em.mi. Card. Praefectus S.C. de Religiosis Consilio Antistitarum generalium," in *Commentarium pro Religiosis*, 45 (1966), 335: "Con nuovi modelli per vestiti di Suore e di religiosi." English in *CLD*, vol. 6, 436.

> prescribed by the Constitutions, and it should not be reduced to a simple ornament suggestive of the Red Cross. The dress should be modeled in a form worthy of consecrated persons, for whom the safeguarding of modesty is of primary importance. Reduce if you will the quantity of the material, trim down the amplitude of the figure, simplify the pleats, the fringes and the lace, eliminate some useless tassels; conceal the cincture if you wish, get rid of the white bibs, but keep the sober and austere line as a visible sign of penance, consecration, piety, always framed in a delicate sense of modesty. So let your habit be suitably long, simple, and sober, such as to be ever fit to "present a chaste virgin to Christ."
>
> Remember that the people expect the Sister to appear, even in her dress, as a symbol of poverty, charity, dedication to the service of the neighbor. The Sister should be distinguishable from other persons even as regards her dress.[65]

By the late 1960s and early 1970s, some institutes had decided that the religious habit was one of those obsolete elements of religious life that had lost its meaning and impact; they chose to abandon the habit and dress instead in simple secular clothing. The Sacred Congregation for Religious addressed this trend in a series of private responses attempting to stem the tide of complete abandonment of the habit while at the same time advocating appropriate modification and recognizing that in some circumstances the habit could and should be set aside. In 1967, the congregation sent a notice to all local ordinaries of the United States concerning the authority of the ordinaries over religious regarding a number of matters, including the habit. According to the notice, *Ecclesiae sanctae I* "seems to confer on the Ordinary the power to judge, in his own territory, if the religious superior has had sufficiently grave motives to waive the use of the religious

[65] "Allocutio Em.mi. Card. Praefectus," in *Commentarium pro Religiosis*, 45 (1966), 335-336: "Diversi, durante questi ultimi tempi, mi hanno scritto lamentando che qua e là si siano introdotti dei cambi che hanno destato sorpresa ed ammirazione. Sono apparsi dei modelli che di religiosi hanno ben poco. Bisogna che sia conservato il carattere austero e dignitoso dell'abito religioso perchè è il segno visibile della consacrazione a Dio. Bisogna che sia conservato il velo, quando le Costituzioni lo prescrivono, e non sia ridotto ad un semplice ornamento da crocerossine. Le vesti devono essere modellate in modo degno di persone consecrate per le quali la salvaguardia della modestia sta al primo luogo. Riducete, pure, la quantità della stoffa, snellite l'ampiezza delle forme, semplificate le pieghe, le trine, i pizzi, certi fronzoli inutili; nascondete se volete le cinture, sopprimete i haveri bianchi, ma conservate la linea sobria ed austera perchè sia segno visibile di penitenza, di consacrazione, di pietà, circonfuso sempre di delicata modestia. Sia quindi il vostro abito lungo, semplice, sobrio per poter sempre 'virginem castam exhibere Christo.' Ricordatevi che il popolo esige che la Suore apparisca anche negli abiti come simbolo della povertà, della carità, della dedizione al servizio del prossimo. Bisogna che essa si distingua dagli altri anche negli abiti." In *CLD*, vol. 6, 437.

habit."[66] However, in the same year, the congregation advised against overemphasis on the reception of the habit during the rites of incorporation into an institute and called for liturgical revision in this regard.

> Too often for families and even for the Sisters, the "reception of the habit" has a greater importance than the profession. And it simply must be said that in many institutes the ceremony of clothing is more solemn than that of profession. The significance given to "religious consecration" by the Council is an invitation to an "updating" of the ceremonies of clothing and profession. The Commission for the Implementation of the Constitution on the Sacred Liturgy is prepared to formulate a ceremonial for religious profession.[67]

The congregation recommended that the reception of the habit "should be reduced to a private ceremony in the oratory of the novitiate or in the chapel but without the presence of the family and without the presence of ecclesiastical authorities, and, especially without solemnity."[68] The Vatican II

[66] SACRED CONGREGATION FOR RELIGIOUS, "Authority of Local Ordinary over Religious: State and Nonconfessional Universities and Associated Residences, Religious Habit," 24 January 1967, in *CLD*, vol. 6, 448. According to article 25 §2 (d) of *Ecclesiae sanctae I*, all religious "are bound by the laws, decrees, and ordinances enacted by the local Ordinary or the episcopal conference which concern the following, among other things … (d) Ecclesiastical attire, but without prejudice to Canon 596 of the Code of Canon Law and Canon 139 of the Oriental Code of Canon Law concerning Religious, and according to the following stipulation: the local Ordinary or the episcopal conference, to avoid things that would astonish the faithful, can forbid clerics, whether secular or Religious, even the exempt, to wear lay dress in public." PAUL VI, apostolic constitution *Ecclesiae sanctae I* 25 §2 (d), in *AAS*, 58 (1966), 770: "§ 2. Item tenentur legibus, decretis et ordinationibus ab Ordinario loci vel a Conferentia Episcoporum latis, quae respiciunt, inter alia: … d) habitum ecclesiasticum, firmis quidem manentibus C. I. C. can. 596 et CICO, de Religiosis, can. 139 et secundum hanc quae sequitur rationem: Ordinarius loci vel Conferentia Episcopalis, ad vitandam fidelium admirationem prohibere potest quominus clerici, sive saeculares sive religiosi, etiam exempti, habitum laicalem publice deferant." English at http://w2.vatican.va/content/aul-vi/en/motu_proprio/documents/hf_p-vi_motu-proprio_19660806_ecclesiae-sanctae.html.

[67] SACRED CONGREGATION FOR RELIGIOUS, "Nuovi orientamenti della S. Congregazione dei Religiosi sull' 'aggiornamento' del postulato e del noviziato," 7 March 1967, in *Commentarium pro Religiosis*, 46 (1967), 408: "Assai spesso, per le famiglie, ed anche per le stesse suore, la 'presa d'abito' ha più importanza della professione. E bisogna pure dire che, in molti Istituti, la cerimonia della prima è più solenne che quella della seconda. Il rilievo dato alla 'consacrazione religiosa' dal Concilio invita ad un 'aggiornamento' nelle cerimonie della vestizione e della professione. Il 'Consilium' per l'esecuzione della Costituzione sulla S. Liturgia è disposto ad abbozzare un cerimoniale di professione religiosa." English in *CLD*, vol. 6, 482.

[68] Ibid. "Quanto alla 'presa d'abito', la S. Congregazione dei Religiosi è d'avviso che essa dovrebbe essere ridotta a una cerimonia interna, nell'Oratorio del Noviziato o in Cappella, ma senza la presenza della famiglia e senza autorità ecclesiastiche, e, soprattutto, senza solennità." In its 1969 instruction on the renewal of religious formation *Renovationis*

Constitution on the Sacred Liturgy *Sacrosanctum concilium* had already called for renewal of the rite of religious profession "to achieve greater unity, sobriety and dignity."[69] The 1970 revised rite provided for the habit and other insignia to be given at first profession rather than at the beginning of the novitiate.[70] The rite of reception into the novitiate was to be "restrained and simple," celebrated in the presence only of the religious community.[71]

In 1972, the Sacred Congregation for Religious responded to inquiries about religious men and women "abandoning the religious habit and even any distinctive external sign of consecration."[72] The congregation reiterated *Perfectae caritatis* on the importance of the habit as a sign of consecration and the appropriateness of modifying habits for purposes of practicality and hygiene, "but they may not abolish it altogether or leave it to the judgment of individual sisters."[73] On the other hand, the congregation, quoting

causam, the Sacred Congregation for Religious, in special norm 33, left all aspects of a habit for novices to the general chapter of each institute. *AAS*, 61 (1969), 118: "Quod ad habitum novitiorum aliorumque ad vitam religiosam candidatorum attinet, Capituli generali est rem definire."

69 SECOND VATICAN COUNCIL, Constitution on the Sacred Liturgy *Sacrosanctum concilium* 80, 4 December 1963, in *AAS*, 56 (1964), 120: "Conficiatur praeterea ritus professionis religiosae et renovationis votorum, qui ad maiorem unitatem, sobrietatem et dignitatem conferat."

70 SACRED CONGREGATION FOR DIVINE WORSHIP, *Rite of Religious Profession*, Introduction 5, in *DOL* 3234, p. 1020.

71 Ibid., Introduction 4, *DOL* 3233, p. 1019. For men, the current rite provides for bestowal of the habit in the sanctuary or other suitable place during the Rite of Temporary Profession during Mass. See "Rite of Religious Profession for Men," 19, in *The Rites of the Catholic Church*, vol. 2, Collegeville, MN, The Liturgical Press, 1991, 216. The Rite of Religious Profession for Women 15-17 provides for blessing and bestowal of the habit, with the exception of the veil, on the day before profession. "At an appropriate time, the superior assembles the community and the novices; in a brief address she prepares the minds of all for the rite of profession to take place the following day. Then she gives the religious habit, with the exception of the veil, to each novice so that she may wear it for the entrance procession at the beginning of Mass." The veil may be presented during the profession Mass. See "Rite of Religious Profession for Women," 34, in *The Rites of the Catholic Church*, vol. 2, 250, 255.

72 SACRED CONGREGATION FOR RELIGIOUS AND FOR SECULAR INSTITUTES, "Criteria ac normae proponuntur circa habitum religiosum sodalium institutorum perfectionis, praesertim mulierum," 25 February 1972, in OCHOA, *Leges Ecclesiae*, vol. 4, n. 4036: "Pervengono a questo Sacro Dicastero notizie da vari paesi secondo le quali religiosi e religiose sempre più numerosi abbandonano l'abito religioso e anche qualunque segno esterno distintivo." English in *CLD*, vol. 7, 534. The name of the congregation was changed from Sacred Congregation for Religious to Sacred Congregation for Religious and Secular Institutes in 1967. In 1989, it was changed to Congregation for Institutes of Consecrated Life and Societies of Apostolic Life.

73 Ibid.: "Ma non è loro concesso di abolirlo del tutto oppure di lasciarlo all'arbitrio delle singole Suore." *CLD*, vol. 7, 534.

Evangelica testificatio 22, recognized that there were circumstances in which religious could be permitted to wear "purely secular clothes, without any recognizable sign."[74] Later in 1972, the congregation issued a similar response, again quoting *Evangelica testificatio* 22. "While we recognize that certain situations can justify the abandonment of a religious type of dress, we cannot pass over in silence the fittingness that the dress of religious men and women should be, as the Council wishes, a sign of their consecration and that it should be in some way different from the forms that are clearly secular."[75]

In several private responses in the mid-1970s, the congregation repeated the same principles: the habit remains a sign of consecration; it is for general chapters of institutes to regulate modifications in the habit; and in circumstances that call for civilian dress, the clothing of religious must reflect poverty and modesty.[76] While it was noted that the congregation does not legislate the details of habits, it did recommend the veil for women religious. "As regards the veil, the wearing of it has been considered from the beginnings of Christianity as a particularly forceful expression of consecration to the Lord. This is not the only sign of it, and as a total sign, it has value only if the reality lived bears witness to the values which it intends to recall: preferential love of the Lord, fraternal charity, service to the brethren."[77]

[74] Ibid.: "D'altra parte l'abito puramente civile, senza alcun segno esteriore di riconoscimento, può essere permesso, per motivi particolari."

[75] SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, "Modification of Constitutions," 10 July 1972, in *CLD*, vol. 7, 481.

[76] Three responses from the Sacred Congregation for Religious and Secular Institutes on the religious habit are published in *Commentarium pro Religiosis*, 58 (1977): "Note sur l'habit," March 1974, 275; letter to "Reverenda Madre," 5 December 1974, 276; and letter to "Reverendo Padre, 1976, 277. English in *CLD*, vol. 8, 385-387.

[77] SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, "Note sur l'habit," March 1974, in *Commentarium pro Religiosis*, 58 (1977), 275: "Pour ce qui regarde le voile, son port a été considéré dès les débuts du christianisme, comme une expression particulièrement forte de la consécration au Seigneur. Ce n'en est pas le seul signe, et, comme tout signe, il n'a de valeur que si la réalité vécue témoigne des valeurs qu'elle entend rappeler: amour de préférence du Seigneur, charité, fraternelle, service des frères." English in *CLD*, vol. 8, 386. The congregation expressed similar sentiments regarding the veil in responses to individual institutes. See, for example, replies to two different institutes published in *CLD*, vol. 9, 432-433. In the first response, dated 4 November 1972, the congregation wrote: "In reference to your question concerning the veil, it is perhaps the oldest and most cherished sign of consecration, though not the only one." In the second response, dated 27 March 1976, the response was: "Since the early ages of the Church the wearing of the veil was considered an outstanding sign of consecrated life. It is not, however, the only sign of consecration; and, as a sign, the veil has value only if the lived reality expresses values intended by it, genuine love of God, fraternal charity and apostolic zeal."

The congregation also warned against "snobbishness and coquetry" among religious who wear secular clothing, and that they should "keep their wardrobes small as becomes poor persons."[78] Also, authorization to wear secular clothing "cannot be granted for personal ideological reasons but must respond to genuine pastoral motives."[79] The congregation tried to maintain a balance between an overemphasis on the habit and total repudiation of it.

> To be sure, the wearing of the religious habit is no more than a sign and, as a sign, holds meaning only if the lived reality bears witness to the values which it seeks to call to mind: preferential love of the Lord, fraternal charity, service to the brethren, austerity of life. However, it must be recognized that for some years past, many institutes are suffering the experience of the deplorable effects which have followed the abandonment of the habit on the mentality, the spiritual life, and the religious life of sisters when the change does not correspond to a real necessity.[80]

In 1976, the prefect of the Sacred Congregation for Bishops addressed the issue of ecclesiastical and religious garb in a letter to papal representatives, who passed it on to conferences of bishops. The stated purpose of the correspondence was to address evidence that some bishops were prodding women's institutes to abandon the habit.[81] The bishops were exhorted to set an example by wearing their own episcopal insignia, especially in meetings with religious and clergy.[82] Later in 1976, the Sacred Congregation for Religious and Secular Institutes sent a notification to the cardinal prefect of the Sacred Congregation for Bishops defending the way it had handled the issue of the habit. The congregation indicated that it had never given general

[78] "Note sur l'habit," in *Commentarium pro Religiosis*, 58 (1977), 275. "Surtout, il est de la plus haute importance … qu'elles évitent le snobisme ou la coquetterie; que leur vestiaire soit réduit en nombre, comme il convient à des pauvres." English in *CLD*, vol. 8, 386-387.

[79] SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, letter to "Reverenda Madre," 5 December 1974, in *Commentarium pro Religiosis*, 58 (1977), 276: "Estas autorizaciones consiguientemente no pueden ser concedidas pro razones ideológicas personales, sino que deben responder a verdaderos motivos pastorales." English in *CLD*, vol. 8, 387.

[80] "Reverenda Madre," in *Commentarium pro Religiosis*, 58 (1977), 276: "Ciertamente, llevar el hábito religioso no es más que un signo y, como signo, sólo tiene sentido si la realidad vivida testimonia los valores que pretende recordar: amor de preferencia al Señor, caridad fraternal, servicio de los hermanos, austeridad de vida. Hey que reconocer sin embargo que desde hace varios años, muchos Institutos están sufriendo la experiencia de los deplorables efectos que ha tenido el abandono del hábito sobre la mentalidad, la vida espiritual y la vida religiosa de las Hermanas, cuando este cambio no corresponda a una necesidad real." English in *CLD*, vol. 8, 388.

[81] SACRED CONGREGATION FOR BISHOPS, "Litterae Circulares circa habitum ecclesiasticum et religiosum," 27 January 1976, in *Commentarium pro Religiosis*, 58 (1977), 269-270. English in *CLD*, vol. 8, 125.

[82] Ibid.

authorization to institutes to abandon the habit and expressed frustration over what it seemed to consider underhanded methods used in some cases to get rid of the habit.[83] "In the majority of cases religious women have abandoned the habit without asking for permission, often hastening to make real those changes in order 'to prevent the future intervention of Rome'! At other times, they have acted under pressure by the clergy and even by some bishops as we can verify precisely, for example, in Canada and in some regions of Brazil."[84] The notification accused general chapters of women's institutes of failing to give adequate attention to the question of the habit and implied that they purposely delayed the sending of their *acta* to the congregation "when the decisions taken would have truly demanded reserve!"[85] The congregation acknowledged that, in general, it had not intervened in men's institutes regarding the habit but had sent responses to more than 100 women's institutes since 1972, mostly international and of the Spanish or French languages.[86] The notification did not indicate why there was less intervention in men's institutes.

The Sacred Congregation for the Evangelization of Nations weighed in on the debate over religious dress in a 1977 private response sent to papal legates dependent on the congregation. The letter was prompted by a report from bishops in Kenya regarding "abuses of some foreign religious women" regarding the habit.[87] The congregation declared that decisions to abandon the habit on the part of some general chapters were "arbitrary and unlawful."[88] It added that, in mission territories, religious were subject to local

[83] SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, "Criteria et normae S. C. pro Religiosis proposita memorantur circa habitum a religiosis gestandum,"12 November 1976, in OCHOA, *Leges Ecclesiae*, vol. 5, n. 4475. English in *CLD*, vol. 9, 434.

[84] Ibid. "Nella maggior parte dei casi le religiose hanno abbandonato l'abito senza domandare il permesso, affrettandosi spesso a realizzare questi cambiamenti per 'prevenire l'eventuale intervento di Roma'! Altre volte hanno agito sotto la pressione stessa del clero, o anche di alcuni Vescovi, come appunto si è potuto verificare, ad esempio, nel Canadà in alcune regioni del Brasile."

[85] Ibid. "Hanno soprattutto temporeggiato proprio quando le decisioni prese avrebbero veramente postulato delle riserve!"

[86] Ibid.

[87] SACRED CONGREGATION FOR THE EVANGELIZATION OF NATIONS, "Mens et criteria S. Congregationis pro Gentium Evangelizatione aperiuntur circa habitum religiosum in territoriis sic dictis missionum gestandum," 25 January 1977, in OCHOA, *Leges Ecclesiasticae*, vol. 5, n. 4490: "Tengo ad assicuraria che Propaganda appoggia pienamente l'atteggiamento preso dai due Vescovi del suddetto paese — a nome della Conferenza Episcopale — contro gli abusi di alcune religiose estere in tale materia." English in *CLD*, vol. 9, 436.

[88] "Mens et criteria," in OCHOA *Leges Ecclesiasticae*, vol. 5, n. 4490: Ibid.: "Si tratta pertanto di prese di posizione arbitrarie ed illegittime." English in *CLD*, vol. 9, 436-437.

bishops when it came to clothing. "Finally, it must be kept in mind that religious women, even if they belong to international religious institutes, must hold themselves bound to the dispositions made by the local hierarchy and, as a result, are always to appear in public with veil and proper dress. It goes without saying that to do otherwise is open disobedience to the Prelates and constitutes bad example, denotes a lack of sound criteria, nor respect for the sensibilities and exigencies of Christianity, and of the local peoples themselves in the midst of whom the religious women exercise their activity."[89] What is unique about this response is the requirement of wearing a veil, since universal legislation did not prescribe it. Likewise, the Sacred Congregation for Religious, even when advocating the veil in its post-concilar private responses, was careful to note that the details of the habit were left to the discretion of each institute.

A few months before promulgating the new Code of Canon Law, Pope John Paul II sent a letter to the Cardinal Vicar of Rome asking him to issue norms on ecclesiastical dress within the Diocese of Rome. The Roman Pontiff expanded on the spiritual significance of religious dress. In addition to being a sign of consecration, as noted in *Perfectae caritatis*, he wrote that it also "makes evident the eschatological end of the religious life" and is a reminder of the sense of the sacred in the "modern secular city."[90] He said he was aware of reasons for not wearing a distinctive style of dress, but they "appear much more of a purely human character than of an ecclesiological one."[91]

In summary, the conciliar and post-conciliar period was a time of rapid change in religious dress in some parts of the world. It began with a widespread call on the part of bishops that habits, especially those of women religious, be simpler, more practical, more suited to the times and local

[89] "Mens et criteria," in OCHOA, *Leges Ecclesiasticae*, vol. 5, n. 4490: Ibid.: "Infine, va ribadito che le religiose, anche se appartengono ad Istituti internazionali devono attenersi alle disposizioni date dalla gerarchia locale e sono pertanto tenute ad apparire in pubblico con il velo e la propria divisa. Il non farlo, oltre ad essere una aperta disobbedienza ai Presuli e costituire un cattivo esempio, denota mancanza di sano criterio, nessun rispetto per i sentimenti, la sensibilità e le esigenze delle cristianità e delle stesse popolazioni locali in mezzo alle quali le religiose svolgono la loro attività." English in *CLD*, vol. 9, 437.

[90] JOHN PAUL II, "Summus Pontifex suadet Em.mo. Cardinali Vicario Urbis ut opportunas emanet normas circa usum habiti ecclesiastici et religiosi pro diocesani romana," 8 September 1982, in OCHOA, *Leges Ecclesiasticae*, vol. 6, n. 4923: "Per il religioso e per la religiosa esso esprime anche il carattere di consacrazione e mette in evidenza il fine escatologico della vita religiosa…. Nella moderna cittá secolare dove si è cosi paurosamente affievolito il senso del sacro, la gente ha bisogno anche di questi richiami a Dio." English in *CLD*, vol. 10, 11-12.

[91] Ibid. "Devo peró soprattutto rilevare che ragioni o pretesti contrari … appaiono molto più di carattere puramente umano che ecclesiologico." English in *CLD*, vol. 10, 12.

circumstances, and more in line with the evangelical counsel of poverty. The bishops gathered at Vatican II incorporated these characteristics into *Perfectae caritatis*, Article 17, which constituted the primary universal norm regarding the habit between Vatican II and the promulgation of the 1983 Code of Canon Law. While, in the 1950s, religious institutes declined to heed Pope Pius XII's call for modification of habits, in the 1960s and 1970s, they wholeheartedly embraced the project. It was a period *ad experimentum*, and some chose to discard the habit altogether, prompting the Holy See to issue a series of private responses on the issue. While these responses did not constitute universal law, they revealed the mind of the Holy See on the question of religious dress. For the most part, the Sacred Congregation for Religious emphasized retention of the habit as a sign of consecration, suitable modification of the habit by general chapters, and wearing of simple and modest secular clothing in circumstances that called for setting aside the habit.

One major change regarding the habit during this period was the abrogation of canon 553 by the introduction of a new Rite of Profession. Reception of the habit no longer marked the beginning of the novitiate, and simplification of the rite of clothing put the habit in proper perspective in relation to the more important element of the rite, profession of the evangelical counsels.

4 — *The Code Revision Process and Canon 669 of the 1983 Code of Canon Law*

Early in the code revision process, the *Coetus studiorum de Institutis perfectionis*, which held its first meeting in November 1966, decided to draft a schema of canons in two major parts. The first part consisted of preliminary canons common to all the states of perfection; the second consisted of canons specific to religious institutes, secular institutes, and societies of apostolic life. The canons on religious institutes were to consist of a typology of the various kinds of institutes, such as monastic, conventual, and apostolic, with a few canons addressing each specific kind. By the end of 1972, the *coetus* had drafted the first major part of the schema and the typology of religious institutes. So far, none of the canons mentioned the religious habit, but the Relator noted another *lacuna*. He recognized the lack of preliminary canons common to all religious institutes, including a canon that identified the essential or substantive elements of these institutes.[92] Consequently, five

[92] RELATOR, *Addenda ad relationem introductivam decimam secundam*, 6 December 1972, in *Communicationes*, 27 (1995), 324.

preliminary canons were presented to the *coetus* at its fifteenth meeting, April 30 to May 5, 1973. It was during the discussion of these canons that the subject of the habit arose.

The first paragraph of the first preliminary canon identified two substantive elements of religious life: profession of the evangelical counsels by public vows and common life.[93] The second paragraph of the proposed canon read: "The public witness of these institutes to be rendered to Christ and the Church entails a separation from the world proper to the character and end of the institute and a sign of consecration of the lives of the members."[94] The paragraph identified separation from the world and "a sign of consecration" as elements of public witness, but it did not mention the habit as the specific sign of consecration. However, the paragraph certainly alluded to the habit as the intended *signum consecrationis*, given that *Perfectae caritatis* 17 identifies it as such. In discussing the canon, one of the consultors said he thought it was perhaps better not to impose the habit, but the group as a whole voted to add an explicit reference to the habit as the sign of consecration.[95] Thus, when the first schema on the states of perfection was circulated for critique in 1977, the first paragraph of canon 92, the preliminary canon on religious institutes, identified the essential elements of religious life as public vows and common life, and the elements of public witness as separation from the world and a suitable habit.[96]

In its October 1979 meeting, the *coetus* voted to remove the reference to the habit from this preliminary canon and include it instead among the obligations of religious.[97] In January 1980, the *coetus* discussed the obligations, including a two-paragraph canon on the habit. According to the first paragraph of canon 52, religious were to wear the habit of their institute as determined by proper law as a sign of consecration and a witness to poverty.[98] The second paragraph obliged clerical institutes that did not have proper habits to adopt the clerical garb of the region.[99] In discussing the canon, one

[93] Ibid., 325.

[94] Ibid. "Testimonium publicum ab his Institutis Christo et Ecclesiae reddendum illam secumfert a mundo separationem indoli et fini cuiusque Instituti propriam necnon signum consecrationis vitae sodalium."

[95] *Communicationes*, 28 (1996), 40. There were eleven votes in favor of adding the habit to the canon; the consultor who thought it best not to impose the habit abstained.

[96] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Schema canonum de Institutis vitae consecratae per professionem consiliorum evangelicorum*, c. 92, Vatican City, Typis Polyglottis Vaticanis, 1977.

[97] *Communicationes*, 12 (1980), 134.

[98] *Communicationes*, 13 (1981), 189.

[99] Ibid.

consultor questioned whether the phrase *iuxta ius proprium* in the first paragraph might allow institutes to suppress the habit.[100] The Relator responded that "this would not be legitimate because, with this formula, reference is made to the proper law only for the concrete determination of the type of habit."[101] Another consultor suggested that the first paragraph say, "'Institutes which have a proper habit are to retain it ...', because not all institutes have a proper habit."[102] The *coetus* did not accept the suggestion and voted to retain the first paragraph as it was.[103] The group did accept a clarification of the second paragraph to specify that "religious clerics" of clerical institutes without a proper habit were to wear clerical garb.[104]

In the 1980 schema of the code, the canon on the religious habit appeared among the obligations and rights of religious institutes and their members. The first paragraph of canon 595 was nearly identical to the first paragraph of canon 52 discussed by the *coetus* in January 1980. The second paragraph contained what could be considered a significant change: it no longer referred specifically to *clerical* institutes that did not have a proper habit, but simply "institutes" that did not have a proper habit.[105] When the Commission for the Revision of the Code of Canon Law reviewed the 1980 schema of the code, two revisions to canon 595 were suggested. One cardinal recommended a complete rewording of the text so that it would require habitual wearing of the habit inside and outside the religious house and require religious to observe diocesan statutes regarding the habit.[106] The secretary of the commission responded that the text was sufficient, noting that it was for superiors to urge religious to wear the habit and that *Ecclesiae sanctae I*

[100] Ibid., 190.

[101] Ibid. "(Risponde il Relatore che ció non sarebbe legittimo, perché con detta formula si rimanda allo ius proprium soltanto la determinazione concreta del tipo di abito.)"

[102] Ibid. "Suggerisce di dire 'Instituta quae proprium habitum habent eum retineant ...', perché non tutti gli Istituti hanno un abito proprio."

[103] Ibid.

[104] Ibid.

[105] Pontificia Commissio Codici Iuris Recognoscendo, *Schema Codicis Iuris Canonici iuxta animadversiones S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum*, Vatican City, Libreria Editrice Vaticana, 1980, c. 595 §2: "Religiosi clerici Insituti quod proprium non habet habitum." The *Relatio* of the Pontifical Commission for the Revision of the Code of Canon Law does not indicate a reason for this change.

[106] Pontificia Commissio Codici Iuris Recognoscendo, *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum schema Codicis Iuris Canonici exhibitarum cum responsionibus a Secretaria et Consultoribus datis*, Vatican City, Typis Polyglottis Vaticanis, 1981, 151.

already addressed the role of the local ordinary in matters of the habit.[107] Another cardinal suggested that the canon specify that religious wear a specific sign (*signum specificum*) of the institute rather than a habit.[108] The secretary rejected this suggestion as contrary to *Perfectae caritatis* 17, *Evangelica testificatio* 22, the notification of 25 February 1972, and the 10 July 1972 circular letter from the Sacred Congregation for Religious.[109]

The canon on the habit, with minor changes in the wording, was promulgated as canon 669 in the 1983 Code of Canon Law. It is among the "Obligations and Rights of Institutes and Members" and reads as follows:

> §1. Religious are to wear the habit of the institute, made according to the norm of the proper law, as a sign of their consecration and as a witness of poverty.
>
> §2. Clerical religious of an institute which does not have a proper habit are to wear clerical dress according to the norm of can. 284.[110]

The first part of the first paragraph — "Religious are to wear the habit of the institute, made according to the norm of the proper law" — is juridical in nature and is adapted from canon 596 of the earlier code. The latter part of the first paragraph, which identifies the habit as a sign of consecration and a witness to poverty, is theological in nature. The reference to the habit as a sign of consecration is derived from *Perfectae caritatis* 17; the reference to the habit as a witness to poverty reflects *Evangelica testificatio* 22. What has been deleted from the 1917 canon is the explicit requirement of wearing the habit both inside and outside the religious house. It is now for the proper law of each institute to determine the circumstances of time and place in which the habit must be worn. What has been excluded from *Perfectae caritatis* 17 is the requirement that habits be simple, modest, poor, decent, and suitable, and the requirement that habits that do not meet these characteristics must be modified. However, because the canons of the 1983 code are to be interpreted in light of Vatican II, *Perfectae caritatis* 17 remains a significant aspect of the law on habits. Other than the general characteristics given in

[107] Ibid.

[108] Ibid.

[109] Ibid. On the notification and circular letter, see footnotes 73 and 76 respectively.

[110] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, Vatican City, Libreria Editrice Vaticana, 1983, c. 669. "§1. Religiosi habitum instituti deferant, ad normam iuris proprii confectum, in signum suae consecrationis et in testimonium paupertatis. §2. Religiosi clerici instituti, quod proprium non habet habitum, vestem clericalem ad normam can. 284 assumant." English translation from *Code of Canon Law, Latin-English Edition: New English Translation*, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, CLSA, 1998. All subsequent English translations of canons from this code will be taken from this source.

the Vatican II decree, universal law does not designate what constitutes a habit or parts of a habit, such as cowl, tunic, scapular, or veil. The style and color of a habit are determined in the proper law of each institute.

The second paragraph of canon 669 makes explicit that religious clerics who are members of institutes that do not have proper habits are to wear the clerical garb of the region. Canon 284, referenced in the second paragraph, stipulates that "clerics are to wear suitable ecclesiastical garb according to the norms issued by the conference of bishops and according to legitimate local custom."[111]

Besides canon 669, the only other canon in the 1983 code that mentions the religious habit is canon 687 on exclaustration. Whereas the 1917 code prohibited exclaustrated religious from wearing their proper habits outside the institute, canon 687 permits them to wear the habit "unless the indult determines otherwise."[112] As noted above, canon 553 of the 1917 code on the reception of the habit at the beginning of the novitiate was abrogated when the new Rite of Religious Profession was promulgated. Unlike the 1917 code, the newer code does not extend canon 669 on the habit to societies of apostolic life, although clerical members of these societies, like religious clerics, are obligated by canon 284.[113] Constitutions of lay societies could require members to wear a habit, but it would be exclusively a matter of proper law.

Like canon 596 of the 1917 code, the obligation addressed in canon 669 §1 of the 1983 code is not that every religious institute have a proper habit, but that individual religious wear the habit proper to their institute.[114] Unlike the 1917 code, canon 669 §2 of the new code explicitly verifies that not all institutes have a proper habit. The question is whether the second paragraph

[111] *CIC*, c. 284. "Clerici decentem habitum ecclesiasticum, iuxta normas ab Episcoporum conferentia editas atque legitimas locorum consuetudines, deferant."

[112] *CIC*, c. 687. "Habitum instituti deferre potest, nisi aliud in indulto statuatur."

[113] According to c. 739, members of societies of apostolic life are bound by the common obligations of clerics unless it is otherwise evident from the nature of the thing or the context.

[114] Several canonists have concluded that canon 669 §1 does not require institutes to have proper habits. See, for example, J. HITE, "The Obligations and Rights of Institutes and Their Members," in J.A. CORIDEN et al. (eds.), *The Code of Canon Law: A Text and Commentary*, New York/Mahwah, NJ, Paulist Press, 1985, 505. "The paragraph is worded similarly to the 1917 Code in that there is no requirement that an institute have a habit since a few institutes have never had a habit." See also G. DI MATTIA, "Commentary on Canon 669," in E. CAPARROS et al. (eds), *Code of Canon Law Annotated*, Montréal, Wilson & Lafleur, 1993, 1789. "The first and immediate reflection upon reading this canon is of a general character: that every institute can have, but not necessarily must have, its own habit that distinguishes it, together with other signifying elements, from other institutes."

refers only to clerical institutes. As noted above, the modifier "clerical" was dropped from an earlier draft of the canon during the code revision process, and the legislator did not replace it before promulgating the code, so the universal law of the Church recognizes that there are clerical and lay religious institutes, whether of men or of women, that do not have habits. Just as there were canonists commenting on the 1917 code who pointed out that some institutes did not have habits, there are canonists commenting on the 1983 code who make the same point. "Not every institute has a habit as part of its tradition. Many have never had a habit or an identifiable garb. Some institutes were founded during periods of persecution of the Church and purposely never adopted a distinctive style of dress. Others, such as the Society of Jesus, have from their foundation simply adopted the customary clerical garb of the particular locale where they live and minister."[115]

Under the 1983 code, one must also take note of canon 578 which, based on *Lumen gentium* 45, *Perfectae caritatis* 2b, and *Ecclesiae sanctae II* 16 §3, requires institutes to observe their patrimony, that is, the "mind and designs of the founder regarding the nature, purpose, spirit, and character of an institute … and its sound traditions."[116] Following Vatican Council II, some institutes which had adopted habits studied their patrimony anew and discovered that it was not the intention of the founder that members wear distinctive religious garb.[117] Some of these institutes discontinued the practice of wearing habits. In the years of post-conciliar experimentation, some institutes discontinued the habit for other reasons.[118] Nonetheless, some canonists,

[115] D. F. O'CONNOR, "Obligations and Rights," in J. HITE et al. (eds), *A Handbook on Canons 573-746*, Collegeville, MN, The Liturgical Press, 1985, 186.

[116] *CIC*, c. 578. "Fundatorum mens ... circa naturam, finem, spiritum et indolem instituti, necnon eius sanae traditiones, quae omnia patrimonium eiusdem instituti constituunt, ab omnibus fideliter servanda sunt."

[117] For example, the intention of Angela Merici was that members of her Company of St. Ursula, which grew into the Ursuline Order, wear modest secular clothing. Angela Merici, *Rule* 2: "Let it also be recalled that their clothes and manner of wearing them should be modest and simple, as truly befits virginal modesty …. Now the dresses should be of coarse cloth or serge, brown or dark tan, or grey, or dark grey, as is convenient for each one according to her possibilities." *Saint Angela Merici Writings: Counsels, Legacies, Rule*, at https://ursulinesmsj.org/_uploads/SaintAngelaMericiwritings.pdf. See also Q. MAXXONIS, *Spirituality, Gender, and the Self in Renaissance Italy: Angela Merici and the Company of St. Ursula (1474-1540)*, Washington, DC, The Catholic University of America Press, 2007, 29, 43, 55. In the 1580s, Charles Borromeo gave new rules to the Ursulines in Brescia and Milan which prescribed a distinctive habit. MAXXONIS, 210.

[118] For example, some institutes deemed habits as "an anomaly and an accretion." See R. MCDERMOTT, "Institutes of Consecrated Life and Societies of Apostolic Life," in J.P. BEAL et al. (eds.), *New Commentary on the Code of Canon Law*, New York/Mahwah, NJ, Paulist Press, 2000, 838.

such as Williamson, see canon 669 §1 as a requirement that all religious wear a habit proper to their institute.

> In this canon it positively prescribes the wearing of the habit as a matter of clear obligation. It does indeed leave the determination of the nature of the habit as well as all regulations concerning the circumstances of its use, to the proper legislation of each institute. In doing so, however, so far from countenancing the abandonment of the concept, the law specifically requires that all religious wear a form of dress which is specific to their own institute and which of itself is recognisable as a witness to the consecrated life espoused by the person in question. The mere appendage of a symbol, such as a cross or even a crucifix, to what is otherwise to all outward appearances a secular attire does not fulfil this requirement of the Church's law.[119]

Commenting on the second paragraph of the canon, Williamson acknowledges that some clerical institutes, from their foundation, adopted local clerical dress rather than a habit.[120] O'Connor points out that religious clerics are not obligated to wear clerical garb at all times. "The instruction given the clergy and religious of the Diocese of Rome addresses this issue and makes it clear that the appropriate clerical dress should be worn for liturgical celebrations, administration of the sacraments, for preaching, and in the ambit of the pastoral ministry."[121]

To summarize, the revised code obligates individual religious to wear the proper habit of their institutes, but it recognizes that not all institutes have a proper habit. Some did not have habits from their origins; some, for various reasons, discontinued the habit before the 1983 code was completed. After promulgation of the code, canonists who commented on canon 669 §1 disagreed on whether it was legitimate for institutes that had habits to abolish them.

By canon 669 §2, clerical members of institutes that do not have habits are obligated to wear clerical dress; non-clerical members of institutes without

[119] E. WILLIAMSON, "Commentary on Canon 669," in G. SHEEHY et al. (eds), *The Canon Law: Letter and Spirit,* Collegeville, MN, Liturgical Press, 1995, 374. See also J. F. GALLEN, *Canon Law for Religious*, New York, Alba House, 1983, 177. "Religious are obliged to wear the habit; the form of the habit is left to the proper law of the institute but it obviously must always be a habit, traditional or modified. The habit, as one of the things approved by the Holy See, could be neither changed nor abolished by a particular institute, pontifical or diocesan, without the permission of the Holy See. Vatican II, in *Perfectae caritatis*, no. 17, said merely that the habit of men or women could be modified and, if unsuitable, should be modified. It said nothing whatever about the abolition of the habit. A permission to change was not a permission to abolish. The SCRSI has constantly repeated: change, yes; abolition, no."

[120] WILLIAMSON, "Commentary on Canon 669," 374.

[121] O'CONNOR, "Obligations and Rights," 187-188.

habits dress according to their proper law. For institutes that have habits, what constitutes the habit is a matter of proper law, but the habit should be in accord with the characteristics mentioned in *Perfectae caritatis* 17. Unlike the 1917 code, the 1983 code does not stipulate that the habit is to be worn inside and outside the religious house and does not designate who is competent to dispense from the obligation of wearing the habit in particular circumstances. These matters are to be determined in the proper law of each institute. The 1983 code, unlike the 1917 code, expresses the value of the religious habit as a sign of consecration and a witness to poverty.

5 — *From 1983 to the Present*

In May 1983, after the new code had been promulgated but before it took effect, the Sacred Congregation for Religious and Secular Institutes announced the end of the post-concilar period *ad experimentum* and put forth "principles and fundamental norms" regarding apostolic religious institutes.[122] In the expositive section of *Essential Elements in the Church's Teaching on Religious Life as Applied to Institutes Dedicated to Works of the Apostolate*, the congregation addressed the habit as an essential element of public witness.

> The totality of religious consecration requires that the witness to the Gospel be given publicly by the whole of life. Values, attitudes and life-style attest forcefully to the place of Christ in one's life…. They wear a religious garb that distinguishes them as consecrated persons, and they have a place of residence which is properly established by their institute in accordance with common law and their own constitutions…. These provisions alone do not ensure the desired public witness to the joy, hope, and love of Jesus Christ, but they offer important means to it, and it is certain that religious witness is not given without them.[123]

In the normative section of *Essential Elements*, the congregation quoted canon 669 §1: "Religious should wear the religious garb of the institute, described in their proper law, as a sign of consecration and a witness of poverty."[124]

[122] Sacred Congregation for Religious and Secular Institutes, instruction *Essential Elements in the Church's Teaching on Religious Life as Applied to Institutes Dedicated to Works of the Apostolate* 2, 31 May 1983. At http://www.vatican.va/roman_curia/congregations/ccscrlife/documents/rc_con_ccscrlife_doc_31051983_magisterium-on-religious-life_en.html.

[123] *Essential Elements*, 34.

[124] *Essential Elements* IX §37.

It was with the 1994 Synod of Bishops on consecrated life and the subsequent apostolic exhortation by Pope John Paul II that a major shift occurred in the Holy See's acceptance of what had developed, *de facto* if not *de iure*, in a number of institutes. The *Lineamenta* for the ninth ordinary general assembly of the Synod of Bishops on Consecrated Life and Its Mission in the Church and in the World was issued in November 1992, with the following statement on religious dress: "Public witness to being consecrated persons and acting as such includes the sign of religious dress according to the prescriptions of the Church and each individual institute."[125] Some religious reacted negatively to the *Lineamenta*, including its statement on religious dress. Religious superiors in Germany issued a statement declaring that religious do not want to be known for the habit or enclosure but for their community life and "by the manner in which they live the common faith and hope, and by their concern for people."[126] In response, the *Instrumentum laboris* for the upcoming synod warned about a loss of identity on the part of religious. "In some cases the legitimate desire to respond to the signs of the times and a greater presence in the world has become merely an adaptation, which has led to the weakening and irrelevancy of the public witness of the consecrated life, and in extreme cases, to an indiscriminate imitation of the secularized, conventional culture. Some note to their regret that many men and women religious have abandoned the sign of the habit proper to their institute."[127] The document also reported: "Many ask that women and men religious give a silent proclamation of their consecration through wearing the habit of their institute."[128]

During the synod, the question of religious dress did not garner a lot of attention, although several participants mentioned it, particularly in relation to poverty. Cardinal Basil Hume, a Benedictine and General Rapporteur of the Synod, talking about "collective wealth and personal poverty," suggested it was time to reopen the debate about the habit as a sign of consecration. "In fact, it has more importance both within and outside the community than

[125] SYNOD OF BISHOPS, *The Consecrated Life and Its Role in the Church and in the World, Lineamenta* 31b, 20 November 1992, Washington, DC, United States Catholic Conference, 1992, 32.

[126] CONFERENCE OF GERMAN RELIGIOUS SUPERIORS (VDO), CONFERENCE OF RELIGIOUS SUPERIORS OF THE GERMAN ORDERS AND CONGREGATIONS OF BROTHERS (VOB), Statement, June 1993, in A. FLANNERY (ed.), *Towards the 1994 Synod of Bishops: The Views of Religious*, Dublin, Dominican Publications, 1993, 148.

[127] SYNOD OF BISHOPS, *The Consecrated Life and Its Role in the Church and in the World, Instrumentum laboris* 25, 20 June 1994, in *Origins*, 24 (1994), 107.

[128] *Instrumentum laboris*, 86, in *Origins*, 128.

is ascertained in certain areas."[129] Father Robert Maloney, Superior General of the Congregation of the Mission (Vincentians), urged the synod to challenge consecrated persons and members of societies of apostolic life to observe a simple lifestyle. "Our belongings, our entertainment, our manner of eating, drinking, dressing, should all state clearly that, while we know how to enjoy God's good gifts, we possess them and use them in the service of the kingdom."[130] Jerome Theisen, Abbot Primate of the Benedictine Confederation, reported on a discussion about poverty by one of the English-speaking groups. "What are the features of poverty which consecrated persons profess? The group cited various aspects of poverty such as an embracing of the poor and crucified Jesus, simplicity of life (dress, style of life, buildings), detachment from material things, sharing of goods, making oneself available to the poor, dependence on God, hard work, and being content with the least."[131] And the Patriarch of Antioch for Syrians urged retention of the habit at least in some countries. "In Muslim countries it is the symbol of total consecration to God."[132]

At the end of the synod, the bishops presented fifty-five *propositiones* to Pope John Paul II, including the following.

> The habit is a sign of religious consecration. In contemporary culture, so secularized and characterized by image, the Church cannot lose the strength of the testimony of those men and women who have dedicated their lives to Christ.
>
> The religious habit or a suitable symbol, that can be adapted to the culture in which the institute serves, must be worn as an eloquent sign of consecration, of poverty, of simplicity and of communion with Jesus the beloved.
>
> The institutes which from their origin or by their constitutions do not have a religious habit, take care that the clothing of the brothers responds faithfully to the dignity *and simplicity* proper to the nature of their vocation.[133]

[129] B. HUME, "*Relatio ante disceptationem"* 24, in *L'Osservatore Romano English Edition,* 41 (12 October 1994), 13.

[130] R. P. MALONEY, "The Synod should offer us various challenges," in *L'Osservatore Romano English Edition,* 45 (9 November 1994), 10.

[131] J. THEISEN, "Take the voice of women seriously," in *L'Osservatore Romano English Edition,* 48 (30 November 1994), 14.

[132] I. A. II HAYEK, "The habit symbolizes total consecration to God," in *L'Osservatore Romano English Edition,* 47 (23 November 1994), 11.

[133] SYNOD OF BISHOPS, *Propositiones del sinodo al papa: Identità Communione Missione* 25, in *Il Regno-Documenti*, 21/94, 668: "L'abito è segno della consacrazione religiosa. Nella cultura contemporanea, così secolarizzata e caratterizzata dall'immagine, la chiesa non può perdere la forza visibile della testimonianza di quegli uomini e di quelle donne che hanno consacrato completamente la loro vita a Cristo. L'abito religioso o un simbolo idoneo, che può essere adattato alla cultura in cui l'istituto presta servizio, sia portato come segno

The proposition is significant for two reasons. First, in contradiction to the Commission for the Revision of the Code of Canon Law, the Synod of Bishops endorsed the wearing of a religious habit *or* suitable symbol. Second, the synod recognized institutes that did not have habits either from their origins *or* by their constitutions. The reference to brothers (*fratelli*) seems to indicate that the statement refers to non-ordained members of clerical institutes that do not have habits. Nonetheless, it is significant in that it recognizes that the constitutions of an institute that may have traditionally had a habit could legitimately prescribe something other than a habit as a sign of consecration.

In his 1996 post-synodal apostolic exhortation *Vita consecrata*, Pope John Paul II accepted the synod's proposition regarding religious dress.

> Since the habit is a sign of consecration, poverty and membership in a particular Religious family, I join the Fathers of the Synod in strongly recommending to men and women religious that they wear their proper habit, suitably adapted to the conditions of time and place. Where valid reasons of their apostolate call for it, Religious, in conformity with the norms of their Institute, may also dress in a simple and modest manner, with an appropriate symbol, in such a way that their consecration is recognizable. Institutes which from their origin or by provision of their Constitutions do not have a specific habit should ensure that the dress of their members corresponds in dignity and simplicity to the nature of their vocation.[134]

In *Vita consecrata*, Pope John Paul II clearly expresses his preference that religious wear a habit,[135] but he notes that it is permissible, for reasons of

eloquente di consacrazione, di povertà, di semplicità e di communione con l'unico amatissimo Gesù. Gli istituti che dall'origine o per le loro costituzioni non prevedono un abito religioso, abbiano cura che l'abbigliamento dei fratelli risponda fedelmente per dignità e *semplicità* alla natura della propria vocazione."

[134] JOHN PAUL II, post-synodal apostolic exhortation *Vita consecrata* 25, 25 March 1996, in *AAS*, 88 (1996), 398-399: "Cum consecrationis plane sit indicium habitus sacer et paupertatis et cum certa quadam religiosa Familia coniunctionis, una cum Synodi Patribus sodalibus religiosis viris ac mulieribus studiose Nos persuademus ut proprium induant habitum, temporum locorumque condicionibus apte accommodatum. Quotiens vero valida id postulant apostolica adiuncta, licebit eis secundum Instituti sui mores regulasque etiam simplex et decorum gestare vestimentum, addito tamen congruo insigni unde eorum agnosci valeat consecratio. Instituta vero quae a propria origine aut legum suarum vi peculiarem non postulant habitum, curent tamen ut membrorum vestitus sua dignitate et simplicitate vocationis illorum indoli respondeat." English translation at http://w2.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_25031996_vita-consecrata.html.

[135] Pope John Paul II often spoke of the importance of the habit when addressing religious. See, for example, the following: "Address of His Holiness Pope John Paul II to Members of the International Union of Superiors General," 16 November 1978, at http://w2.vatican.va/content/john-paul-ii/en/speeches/1978/documents/hf_jp-ii_spe_19781116_superiore-generali.html; "Homily of His Holiness John Paul II" at Holy Mass celebrated for women religious

the apostolate, to wear simple and modest attire other than a habit, along with a symbol of consecration. Furthermore, when speaking of institutes that do not have habits, either from their origins or by their constitutions, he makes no distinction between clerical or lay institutes, or men's or women's institutes.

Conclusion

Pope John Paul II's 1996 post-synodal apostolic exhortation is the most recent document of the Apostolic See that addresses the religious habit in a way that is significant to this study of church law. The current universal law on religious dress is canon 669 of the 1983 Code of Canon Law, interpreted in light of *Perfectae caritatis* 17 and *Vita consecrata*. The *ius vigens* is that religious women and men are obligated to wear the habit proper to their institute, but there are institutes that do not have habits, either from their origins or by their constitutions. Clerical religious who are members of institutes that do not have habits are required to wear clerical dress, in accord with particular law and legitimate local custom. Lay religious whose institutes do not have habits are to dress simply and to wear some sign of consecration, which could be a cross, ring, medal, or other insignia or emblem. The habits of institutes that have them are to be simple, modest, poor, decent, suited to the requirements of health and to the circumstances of time and place, and accommodated to the needs of ministry. It is for the proper law of each institute to determine what constitutes the habit, when and where the members are obligated to wear it, and who is competent to dispense from the obligation in particular circumstances.

The *ius vigens* represents both continuity with and departure from the 1917 Code of Canon Law. Under the former code, religious were obligated to wear the habit of their institute inside and outside the religious house, with the possibility of dispensations granted by competent superiors for grave causes and urgent necessities. However, even then, some approved institutes, usually but not exclusively clerical institutes, did not have habits. Reception of the habit was the usual means of being admitted to the novitiate, and many institutes had rituals that emphasized the habit more than the actual purpose

of Jasna Gora in Poland, 5 June 1979, at http://w2.vatican.va/content/john-paul-ii/en/homilies/1979/documents/hf_jp-ii_hom_19790605_polonia-jasna-gora-religiose.html; and "Address of John Paul II to the Priests, Religious and Laity," at the Cathedral of Gaborone, Botswana, 13 September 1988, at http://w2.vatican.va/content/john-paul-ii/en/speeches/1988/september/documents/hf_jp-ii_spe_19880913_cattedrale-gaborone.html.

of the novitiate. With the revised Rite of Profession, the reception of the habit takes place at the time of first profession and is more discreet, so as not to overwhelm the public profession of the evangelical counsels.

The journey from the 1917 code to the present was an evolutionary one, influenced by both ecclesiastical authority and the actual practice of religious institutes, but not always in tandem. During the pontificate of Pius XII, religious, especially women religious, were urged to modify their habits, but few heeded the call. When Vatican Council II recommended that institutes adopt simplified habits, many institutes quickly went about the task. When some institutes abolished the habit altogether, the Holy See tried to convince them to modify but retain a distinctive garb. By the time of the 1994 Synod of Bishops, religious who no longer wore habits were not inclined to resume the practice, and the bishops seemed to recognize this reality. They recommended to Pope John Paul II that religious be urged to wear a habit or another sign of consecration. The Roman Pontiff allowed for such flexibility and diversity in *Vita consecrata*, and the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life approves constitutions that reflect this flexibility and diversity.

Studia canonica 52 | 2018, 81-101
doi: 10.2143/STC.52.1.3285214

CANON 838 §2 AND THE ADAPTATION OF LITURGICAL BOOKS AFTER THE *MOTU PROPRIO MAGNUM PRINCIPIUM*

JOHN J.M. FOSTER*

SUMMARY — In the motu proprio *Magnum principium*, Pope Francis modified canon 838 §§2 and 3 of the Code of Canon Law. Examining paragraph 2 of the revised canon, the author traces the development of the regulation of liturgical adaptations from the proposed schema of *Sacrosanctum concilium* through the conciliar debate and 1994 instruction *Varietates legitimae*. He concludes that the modification of canon 838 §2 has integrally reordered the law pertaining to the unforeseen adaptation of liturgical books, derogating from the requirement of *Sacrosanctum concilium* 40 that the Apostolic See grant its consent to proposals made by a conference of bishops for these adaptations.

RÉSUMÉ — Dans le motu proprio *Magnum principium*, le pape François modifie le canon 838, §§ 2 et 3 du Code de droit canonique. En examinant le paragraphe 2 du canon révisé, l'auteur trace le développement des règles sur les adaptations liturgiques à partir du schéma proposé de *Sacrosanctum concilium* au débat conciliaire et l'instruction de 1994 *Varietates legitimae*. Il en conclut que les modifications apportées au canon 838, § 2 réorganisent entièrement le droit portant sur les adaptations non prévues des livres liturgiques, dérogeant de l'exigence de *Sacrosanctum concilium* 40 à l'effet que le Siège apostolique donne son consentement aux propositions faites par une conférence épiscopale pour ces adaptations.

Introduction

I am grateful for the invitation of Monsignor John Renken, Dean of the Faculty of Canon Law at St. Paul University, to present this lecture during

* J.C.D., Presbyter of the Diocese of Stockton, Vicar General and Moderator of the Curia, Archdiocese for the Military Services, USA. President of the Canon Law Society of America.

Canon Law Society of America Presidential Lecture, St. Paul University, Ottawa, Canada, 6 March 2018.

my term as president of the Canon Law Society of America. In this capacity, I bring the fraternal greeting of the members of the CLSA to you: the faculty, students and alumni of this esteemed faculty.

1 — *Changes to Canon 838 §§ 2, 3*

The apostolic letter motu proprio *Magnum principium* of Pope Francis, promulgated on 9 September 2017 and effective on 1 October 2017, modified paragraphs 2 and 3 of canon 838 of the Code of Canon Law.[1] Canonists who know the law on the Church's *munus sanctificandi* are well acquainted with canon 838, which spells out the authorities competent to regulate the liturgy and their responsibilities in doing so. As promulgated by Pope Saint John Paul II in 1983, canon 838 had stated:

> §1. The direction of the sacred liturgy depends solely on the authority of the Church which resides in the Apostolic See and, according to the norm of law, the diocesan bishop.
>
> §2. It is for the Apostolic See to order the sacred liturgy of the universal Church, publish liturgical books and review their translations in vernacular languages, and exercise vigilance that liturgical regulations are observed faithfully everywhere.
>
> §3. It pertains to the conferences of bishops to prepare and publish, after the prior review of the Holy See, translations of liturgical books in vernacular languages, adapted appropriately within the limits defined in the liturgical books themselves.
>
> §4. Within the limits of his competence, it pertains to the diocesan bishop in the Church entrusted to him to issue liturgical norms which bind everyone.[2]

An almost verbatim repetition of *Sacrosanctum concilium* 22 §1, paragraph 1 of the canon sets forth the Church's exclusive right to regulate the liturgy against any civil intervention[3] and stipulates the specific ecclesiastical authorities in whom this competence resides: the Apostolic See and, *ad normam iuris*, the diocesan bishop.

[1] POPE FRANCIS, apostolic letter motu proprio *Magnum principium*, 3 September 2017: http://w2.vatican.va/content/francesco/la/motu_proprio/documents/papa-francesco-motu-proprio_20170903_magnum-principium.html (25 February 2018).

[2] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, Vatican City, Libreria Editrice Vaticana, 1983, c. 838. The English translation is taken from *Code of Canon Law, Latin-English Edition: New English Translation*, Washington, D.C., Canon Law Society of America, 1998. Unless otherwise noted, all translations will come from this source

[3] See similar examples in the 1983 code, cc. 747 §1 (ministry of the word), 1071 §1, 2° (marriage), 1254 (temporal goods), and 1311 (penal sanctions).

Paragraph 2 articulates in broad strokes the competence of the Apostolic See. As we know, these competencies were further elaborated in the 1988 apostolic constitution *Pastor bonus*, articles 62–70.[4]

While paragraph 3 mentions only the preparation and publication of translations of liturgical books and their adaptations as within the competence of conferences of bishops, canon 455 §1 permits conferences to "issue general decrees in cases where universal law has prescribed it or a special mandate of the Apostolic See has established it either motu proprio or at the request of the conference itself." Numerous examples can be found in Book IV of the code as well as the ritual books where the conference is empowered to issue a general decree or general executory decree.

Finally, paragraph 4 specifies the diocesan bishop's broad legislative authority over the liturgy in the particular church entrusted to his care.

The apostolic letter *Magnum principium* made no changes in paragraphs 1 and 4 of canon 838. Only paragraphs 2 and 3 have been revised. These modifications are easily seen when the original and revised texts are placed side by side.

Canon 838 as promulgated by Pope Saint John Paul II	Canon 838 as modified by Pope Francis
§2. Apostolicae Sedis est sacram liturgiam Ecclesiae universae ordinare, libros liturgicos edere *eorumque versiones in linguas vernaculas recognoscere,* necnon advigilare ut ordinationes liturgicae ubique fideliter observentur.	§2. Apostolicae Sedis est sacram liturgiam Ecclesiae universae ordinare, libros liturgicos edere, **aptationes, ad normam iuris a Conferentia Episcoporum approbatas, recognoscere,** necnon advigilare ut ordinationes liturgicae ubique fideliter observentur.[5]
§3. Ad Episcoporum conferentias spectat versiones librorum liturgicorum in linguas vernaculas, convenienter intra limites *in ipsis libris liturgicis* definitos *aptatas*, parare, *easque* edere, *praevia recognitione Sanctae Sedis*.	§3. Ad Episcoporum Conferentias spectat versiones librorum liturgicorum in linguas vernaculas **fideliter et** convenienter intra limites definitos **accommodatas** parare **et approbare atque libros liturgicos, pro regionibus ad quas pertinent, post confirmationem Apostolicae Sedis,** edere.[6]

Note: the italicized text in the left column has been deleted. The text in bold in the right column has been added.

[4] See POPE JOHN PAUL II, apostolic constitution *Pastor bonus*, 28 June 1988, in *AAS*, 80 (1988), 876–878.

[5] "§2. It is for the Apostolic See to order the sacred liturgy of the universal Church, publish liturgical books, **review adaptations approved by the Conference of Bishops according to the norm of law**, and exercise vigilance that liturgical regulations are observed faithfully everywhere." (Translation by the author)

[6] "§3. It pertains to the conferences of bishops to prepare **and approve** translations of the liturgical books in vernacular languages **faithfully and** suitably accommodated within

The modifications made to paragraphs 2 and 3 are both substantial and procedural. The substantial changes reflect the *object* of the Holy See's intervention. In the case of paragraph 2, it is the adaptations approved by the conference of bishops according to the norm of law. In paragraph 3, it is the approval of the vernacular translations of liturgical books issued by the Apostolic See, faithfully and suitably accommodated within defined limits. One also observes that mention of adaptations has been moved from paragraph 3 to paragraph 2, and mention of vernacular translations has been moved from paragraph 2 to paragraph 3.

The procedural modifications reflect the type of intervention the Holy See makes vis-à-vis the object. Paragraph 3 has seen the introduction of the Apostolic See's *confirmatio* of liturgical books containing the faithful vernacular translations approved by the conference of bishops, replacing the prior *recognitio*. No technical change has been introduced in paragraph 2 concerning the nature of the Holy See's intervention: the *recognitio* remains the form of the intervention with regard to the specified acts of the conference of bishops. However, I propose that this status quo furthers the Holy Father's "need to promote a sound 'decentralization'."[7]

Since the publication of *Magnum principium*, much attention has been paid to the modified paragraph 3 of canon 838. In contrast, little attention has been paid to the modification made to paragraph 2 of canon 838. It is to this paragraph that I would like to devote our attention, focusing first on the object of the Apostolic See's intervention, i.e., liturgical adaptations approved by the conference of bishops, and then on two implications concerning the nature of that intervention.

defined limits, **and to publish the liturgical books for the regions for which they are responsible after the confirmation of the Apostolic See**." It may be useful to point out that the English translation of the revised canon 838 §3 published in the 9 September 2017 Bulletin by the Holy See's Press Office is inaccurate. The verbs *parare* and *approbare* refer to the vernacular translations while the verb *edere* refers to the liturgical books after the intervention of the CDWDS. This is clear from the sentence structure and the conjunction *atque*. (Translation by the author)

7 POPE FRANCIS, apostolic exhortation *Evangelii gaudium*, 24 November 2013, n. 16, in *AAS*, 105 (2013), 1027. English translation from http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html (25 February 2018). All translations from the exhortation will be taken from this source.

2 — *The Adaptation of Liturgical Books*

Pope Francis states that his rationale for modifying paragraphs 2 and 3 of canon 838 is to clarify the competencies of the Apostolic See and conferences of bishops concerning the translation and adaptation of liturgical books. He notes that these changes are in keeping with "what is stated in the Constitution *Sacrosanctum concilium*, in particular in articles 36 §§3, 4, 40 and 63, and in the Apostolic Letter Motu Proprio *Sacram liturgiam*, n. IX." Because article 40 of the liturgy constitution has a bearing on the modification of canon 838 §2, it can be profitable to examine it and its history in more detail.

2.1 — The Development of the Articles on Liturgical Adaptation in *Sacrosanctum concilium*

Adaptation has been a part of Christian liturgy since the beginning. Thus, it is not surprising that the 1963 Constitution on the Sacred Liturgy *Sacrosanctum concilium* includes a section in chapter 1 entitled "Norms for Adapting the Liturgy to the Culture and Traditions of Peoples." After setting forth the liturgical principle in article 37 that "the Church has no wish to impose a rigid uniformity in matters that do not affect the faith or the good of the whole community,"[8] the council establishes this juridic principle in article 38.

> Provisions shall also be made, even in the revision of liturgical books, for legitimate variations and adaptations to different groups, regions, and peoples, especially in mission lands, provided the substantial unity of the Roman Rite is preserved; and this should be borne in mind when rites are drawn up and rubrics devised.[9]

As we know, two articles follow that lay out the council's norms on liturgical adaptations, distinguishing two types of adaptations. Article 39 gives to conferences of bishops the competence to make adaptations for their respective territories "within the limits set by the typical editions of the liturgical books."[10] Because these article 39 adaptations have been identified

[8] VATICAN COUNCIL II, constitution *Sacrosanctum concilium*, 4 December 1963, n. 37, in *AAS*, 56 (1964), 110. Translation taken from INTERNATIONAL COMMISSION ON ENGLISH IN THE LITURGY, *Documents on the Liturgy, 1963–1979: Conciliar, Papal, and Curial Texts*, Collegeville, The Liturgical Press, 1982, no. 37. Hereafter, citations from this source will be cited as *DOL* followed by the margin reference.

[9] *SC*, 38, in *AAS*, 56 (1964), 110; *DOL*, 38.

[10] *SC*, 39, in *AAS*, 56 (1964), 110; *DOL*, 39, adapted.

and approved by the Apostolic See in revising the rites, they are often called *foreseen adaptations*. On the other hand, *Sacrosanctum concilium* 40 deals with adaptations *unforeseen* by the Apostolic See in the revision of the ritual books. The liturgy constitution goes so far as to outline a process by which conferences of bishops can introduce these more profound (*profundior*) adaptations into the liturgical books used in their respective territories.

So as to understand better the import of the Holy Father's reference to *Sacrosanctum concilium* 40 in the motu proprio, it is necessary to study both articles 39 and 40 in the promulgated conciliar text, as well as their predecessors (articles 21 and 22) in the pre-conciliar and conciliar drafts. Under the presidency of Cardinal Gaetano Cicognani, the Preparatory Commission on the Sacred Liturgy held the first of three plenary meetings on 12 November 1960.[11] Based on a series of *Quaestiones* honed by the secretariat of the central commission from proposals made by bishops around the world, thirteen subcommissions drafted reports for the preparatory commission's second plenary meeting in April 1961. From these reports, the liturgy secretariat began writing the first draft of a schema. A second draft was sent to the commission members in August. At the third and final plenary meeting of the preparatory commission in January 1962, the final text of a preface and eight chapters was approved. Cardinal Cicognani signed the schema only four days before his death on 5 February 1962.

As approved by the Preparatory Commission on the Sacred Liturgy at its third plenary meeting in January 1962, articles 21 and 22 read as follows.

> 21. [*Limits of adaptation*]. Thus, the limits to be observed in making this adaptation are to be established by ecclesiastical legislation so that, with due regard for the force of the typical editions of the liturgical books published or to be published by the Holy See, a broader faculty of regulating divine worship is to be granted to the ordinaries of individual provinces or regions, or even of the national episcopal conference, especially

[11] See Joseph A. KOMONCHAK, "The Struggle for the Council During the Preparation of Vatican II (1960–1962)," in *The History of Vatican II*, Giuseppe ALBERIGO (ed.), Joseph KOMONCHAK (Eng. ed.), vol. 1, Maryknoll, N.Y., Orbis, 1995, 206–211 (hereafter *The History of Vatican II* will be abbreviated ALBERIGO-KOMONCHAK followed by the volume and page numbers); Josef Andreas JUNGMANN, "Constitution on the Sacred Liturgy," in *Commentary on the Documents of Vatican II*, Herbert VORGRIMLER (ed.), vol. 1, New York, Herder and Herder, 1967, 1–8; David John WALKOWIAK, *The Diocesan Bishop and the* Munus Sanctificandi*: a Study of Its Legal Development*, Canon Law Studies 520,Washington, D.C., The Catholic University of America, 1987, 65–66; Annibale BUGNINI, *The Reform of the Liturgy 1948–1975*, Matthew J. O'CONNELL (trans.), Collegeville, The Liturgical Press, 1990, 14–28.

as regards the administration of the sacraments and of sacramentals, processions, liturgical language, sacred music and arts.

22. [*Adaptation of the Liturgy especially in the Missions*]. And because in some regions, especially in mission lands, the adaptation of the Liturgy becomes more difficult and rather urges:

1) In episcopal conferences and in liturgical commissions it is to be carefully and prudently considered what, in this matter, may be appropriately admitted into divine worship from the traditions and culture of individual peoples. They are to propose to the Apostolic See adaptations considered useful or necessary that will be introduced with its consent.

2) That adaptation may be done with the necessary circumspection, as often as necessity or utility requires it, the faculty may be granted to the episcopal conference by the Holy See so that it permits and directs the necessary preliminary experiments within certain groups suited for the purpose and for a fixed time.[12]

Per the pre-conciliar process, the liturgy schema was sent to the Central Preparatory Commission, whose task was to oversee the work of the various preparatory commissions. When this section of the liturgy schema was discussed by the Central Preparatory Commission on 26 March 1962, no changes were made. However, when the approved schema was sent to the conciliar fathers in July 1962 and introduced to the council on 22 October, the phrase "actis a Sancta Sede recognitis (cf. can. 291)" had been inserted at the end of article 21.[13] This completely changed the purpose of the article. Instead of endorsing a decentralization in liturgical matters—the "broader faculty of regulating divine worship"—the revised article 21 maintained the centralized paradigm.[14]

Of course, as with much of the debate on the liturgy schema during the Second Vatican Council, what was at issue was not so much liturgy as ecclesiology, i.e., is authority centered solely in the pope and the Roman Curia, or do bishops and groupings of them also exercise authority? Speaking to the proposed article 21 during the council, Cardinal Ernesto Ruffini,

[12] VATICAN COUNCIL II, *Acta et documenta Concilio Oecumenico Vaticano II apparando*, Series II, Praeparatoria, vol. II, part 3, Vatican City, Typis Polyglottis Vaticanis, 1968, 36.

[13] See *Schema constitutionis de sacra Liturgia*, in VATICAN COUNCIL II, *Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II*, vol. I, part 1, Vatican City, Typis Polyglottis Vaticanis, 1970, 270–271. Hereafter, this source will be cited as *AS* followed by the volume and page numbers.

[14] See BUGNINI, 26–27 for a discussion of the secret secretariat alleged to have changed the schema before it was sent to the conciliar fathers in July.

archbishop of Palermo, opined that the phrase "a Sancta Sede recognitis" was insufficient in light of Pius XII's teaching in the encyclical letter *Mediator Dei*.[15] In a written intervention, Archbishop Octavio Márquez Tóriz of Puebla de los Angeles suggested that "et adprobatis" be added.[16] Cardinal Juan Landázuri Ricketts, archbishop of Lima, saw the phrase to be open to diverse interpretations, which could lead to a fracturing of the Roman rite.[17] Archbishop Eugene D'Souza of Nagpur suggested that the *recognitio* by the Holy See would protect the substantial unity of the Roman rite, serving as a safeguard of unity.[18]

On the other hand, Bishop Clemente Isnard of Nova Friburgo proposed deleting the phrase "a Sancta Sede recognitis" from article 21. He reasoned that

> the purpose of this article is to grant a little power to bishops regarding the regulation of divine worship.... For the councils are held in order to compose new laws, not that everything may be preserved immutably. The whole thing happens sensibly with the approval of the Roman Pontiff.
>
> The limits of this faculty are clearly and precisely established in the body of the article, "with due regard for the force of the typical editions of the liturgical books published or to be published by the Holy See." There are limits, and indeed strict ones. Bishops, therefore, will be able to do nothing contrary to the unity of the Roman rite.[19]

He concluded by observing that "if acts of the bishops are obliged to be reviewed by the Holy See according to the norm of can. 291, then absolutely no faculty is granted."[20]

[15] *AS* I/1, 366. See also WALKOWIAK, 102–103.

[16] *AS* I/1, 637: "Unde articulus posset hoc modo exprimi: « Limites servandis ... Conferentiae episcopalis nationalis sit divinum cultum ordinare ... actis a Sancta Sede recognitis et adprobatis »."

[17] *AS* I/1, 375: "… dum conceditur Ordinariis singularum provinciarum vel regionum vel etiam Conferentiae episcopali nationali maior facultas divinum cultum ordinandi, imprimis quoad administrationem sacramentorum et sacramentalium, processiones, linguam liturgicam, musicam sacram et artes, etc., non clare apparent limites huius facultatis concessae eo quod verba finalia eiusdem paragraphi, « actis a Sancta Sede recognitis », possunt interpretari diverso modo, et proinde forsitan aliquod periculum prae se ferre ne via aperiatur effusiori licentiae ex qua ipsa substantialis ritus unitas quadamtenus [*sic*] labefactetur."

[18] *AS* I/1, 498.

[19] *AS* I/1, 489: "… finis huius articuli est concedere episcopis aliquantulam potestatem circa divini cultus ordinationem. Est derogatio partialis can. 1257 quod statuit: « Unius Sedis Apostolicae est liturgiam ordinare ». Nam Concilia adunantur ad novas leges condendas, non ut omnia immutabiliter conserventur. Totum sane fit cum approbatione Romani Pontificis.

"Limites huius facultatis clare et praecise in corpore articuli statuuntur, nempe « intacta vi editionis typicae librorum liturgicorum a S. Sede editorum vel edendorum ». Sunt limites, et quidem stricti. Episcopi ergo nihil poterunt agere contra unitatem ritus romani."

[20] *AS* I/1, 489: "si acta episcoporum a S. Sede recognosci debeant ad normam can. 291, tunc prorsus nulla facultas conceditur."

In light of the debate on the adaptation of the liturgy, the conciliar Commission on the Sacred Liturgy proposed a formal amendment to article 21 and emendations to article 22, which became articles 39 and 40 in the revised schema.[21] The revised article 39 read:

> Within the limits set by the typical editions of the liturgical books, it shall be for the competent territorial ecclesiastical authority mentioned in art. 22, §2 to specify adaptations, especially in the case of the administration of the sacraments, the sacramentals, processions, liturgical language, sacred music, and the arts. This, however, is to be done in accord with the fundamental norms laid down in this Constitution.[22]

In a sense, the amendment gave something to each side of the centralization-decentralization debate. Those who appealed to preserve the substantial unity of the Roman rite saw the deletion of a reference to ordinaries of provinces or regions from the article and parameters set for liturgical adaptation: limits established by the Apostolic See in the revised books.[23] At the same time, those who argued for some liturgical authority for bishops were successful in having the phrase "a Sancta Sede recognitis" deleted. With the affirmative vote of the fathers,[24] article 39 was basically restored to its pre-conciliar text. No further changes were made to this article nor article 40 prior to the promulgation of *Sacrosanctum concilium* in 1963.

2.2 — The Implementation of *Sacrosanctum concilium* 39

As directed by *Sacrosanctum concilium* 39, in each of the liturgical books revised and published by the Apostolic See after the Second Vatican Council, the *praenotanda* concludes with a section or article specifying the adaptations within the competence of the conference of bishops. In many cases, provision is also made for adaptations by the diocesan bishop and/or accommodations by the minister. For example, number 390 of the General Instruction of the

[21] Bishop Charles Calewaert's report on the conciliar Commission on the Sacred Liturgy's rationale for these changes can be found in *AS* I/2, 289–290.

[22] *AS* I/4, 267: "Intra limites in editionibus typicis librorum liturgicorum statutos, erit competentis auctoritatis ecclesiasticae territorialis, de qua in art. 22 §2, [textus emendati], aptationes definire, praesertim quoad administrationem Sacramentorum, quoad Sacramentalia, processiones, linguam liturgicam, musicam sacram et artes, iuxta tamen normas fundamentales quae hac in Constitutione habentur." Translation from *DOL* 39, adapted.

[23] See JUNGMANN, 27: "The ecclesiastical hierarchy on the spot, which alone is conversant with local prerequisites, must speak here, but—here again—not individual bishops: the possibility left open for it in the schema was assailed in the assembly and deleted by the Commission, because every unnecessary rupture was to be avoided."

[24] The vote on amendment three was 2,044 in favor; 50 opposed and 15 null. See *AS* I/4, 316.

Roman Missal specifies that the conference of bishops can adapt the gestures and posture of the faithful; the gestures of veneration toward the altar and the Book of the Gospels; the texts of the chants at the entrance, the presentation of the gifts, and Communion; the readings from Sacred Scripture used in special circumstances; the form of the sign of peace; the manner of receiving Communion; and the materials for the altar and sacred furnishings, sacred vessels, as well as the materials, form, and color of the liturgical vestments.[25]

The Rite of Christian Initiation of Adults grants to the diocesan bishop the competence to establish the formation program of the catechumenate and norms according to local needs; to determine whether and when the entire rite of initiation may be celebrated outside the usual times; to dispense from no more than two scrutinies; to permit the simple rite to be used partially or entirely; to depute catechists to give the exorcisms and blessings; to preside at the Rite of Election, ratifying the admission of the elect; and, *ad normam iuris*, to stipulate the requisite age for godparents.[26]

As an example of an accommodation permitted by liturgical law to ministers, Pastoral Care of the Sick states: "The minister should be especially aware that the sick tire easily and that their physical condition may change from day to day and even from hour to hour. For this reason the celebration may be shortened if necessary."[27]

These examples fall within the foreseen adaptations of *Sacrosanctum concilium* 39 because each has been identified and approved by the legislator for inclusion in the typical editions of the liturgical books. The conference of bishops (like the diocesan bishop or minister) is free to adopt none, any, or all of the adaptations listed in the rite and its *praenotanda*.

2.3 — Canon 838 §3

We have seen that *Sacrosanctum concilium* 39 does not require the intervention of the Apostolic See. This is because the Holy See has "pre-intervened"

[25] *Institutio generalis Missalis romani*, editio typica tertia, in *Missale Romanum, ex decreto Sacrosancti Oecumenici Concilii Vaticani II instauratum auctoritate Pauli PP. VI promulgatum Ioannis Pauli PP. II cura recognitu*, editio typica tertia, Vatican City, Typis Vaticanis, 2002, n. 390.

[26] *Ordo initiationis christianae adultorum*, editio typica, Vatican City, Typis Polyglottis Vaticanis, 1972, n. 34.

[27] *Ordo unctionis infirmorum eorumque pastoralis curae*, editio typica, n. 40, Vatican City, Typis Polyglottis Vaticanis, 1972, 22. English translation from *Pastoral Care of the Sick: Rites of Anointing and Viaticum*, approved for use in the Dioceses of the United States of America by the National Conference of Catholic Bishops and confirmed by the Apostolic See, New York, Catholic Book Publishing, Co., 1983, 28.

in each of the rituals by establishing the limits within which the conference of bishops can adapt the liturgy for its territory. Nevertheless, one cannot forget that article 63b of the liturgy constitution required that particular rituals, including the language employed and suitably adapted "to the needs of the different regions," prepared by the conference of bishops receive the *recognitio* of the Holy See before they can be used.[28]

Not surprisingly, it was this provision of article 63b—and not article 39—that was incorporated in paragraph 3 of canon 838 of the Code of Canon Law promulgated by Pope Saint John Paul II. "It pertains to the conferences of bishops to prepare and publish, after the prior review of the Holy See, translations of liturgical books in vernacular languages, adapted appropriately within the limits defined in the liturgical books themselves." I say "not surprisingly" for two reasons. First, the established practice dating from the earliest post-conciliar reforms saw conferences of bishops send to the Apostolic See their adapted liturgical books for the *recognitio*. That these liturgical books also contained vernacular translations (which, of course, required the Holy See's *confirmatio* according to *Sacram liturgiam* IX) blurred any potential juridic distinction between article 39 and article 63b. Second, article 63b would have been favored over article 39 by curial officials and others who were more supportive of a centralized role for the approval of liturgical matters. Reiner Kaczynski has contrasted the uproar concerning the change in the conciliar norm after the promulgation of *Sacram liturgiam* with the lack of discontent following the promulgation of the code.

> When the 1983 Code of Canon Law, in canon 838 §3, granted the episcopal conferences the right only to see to the translation of the liturgical books into the vernacular and to adapt this translation, and then to publish it after prior scrutiny by the Holy See ("praevia recognitione Sanctae Sedis"), there was not a word heard about letters of protest from cardinals and bishops. And yet in setting up this provision the code clearly deprived the will of the Council of its force.[29]

Frederick R. McManus was more direct: "At times the code turns its back on the decrees of the Second Vatican Council. The canon on the power of the conferences of bishops in liturgical matters is a pale shadow of the conciliar constitution on the liturgy (SC 22, 2; 39-40; see canon 838, 3)."[30]

[28] *SC*, 63b, in *AAS*, 56 (1964), 117; *DOL* 63b.

[29] Reiner KACZYNSKI, "Toward the Reform of the Liturgy," in ALBERIGO-KOMONCHAK, III: 255, n. 223.

[30] Frederick R. MCMANUS, "Local, Regional, and Universal Church Law," in Bernard COOKE (ed.), *The Papacy and the Church in the United States*, New York, Paulist Press, 1989, 181.

2.4 — The Implementation of *Sacrosanctum concilium* 40

The conciliar fathers foresaw that, in some places, there may be the need for more profound adaptation of the liturgy. Article 40 established in summary form a process whereby such adaptations could be introduced in the liturgy. In broad strokes, the process called for (1) discernment of the need for more profound adaptation by the conference of bishops, (2) a proposal from the conference to the Apostolic See of adaptations considered useful or necessary, (3) a period of experimentation with certain groups and for a determined period of time, and (4) if so judged by the Apostolic See and with its consent, the introduction of the proposed adaptations in the territory of the conference of bishops.

With the 1970 instruction *Liturgicae instaurationes*, the third on implementing the liturgy constitution, the Congregation for Divine Worship sought to bring some order and additional guidance to conferences of bishops proposing more profound adaptations and conducting experiments. "All earlier permissions for experimentation with the Mass, granted in view of the liturgical reform as it was in progress, are to be considered as no longer in effect. Since publication of the *Missale Romanum* the norms and forms of eucharistic celebration are those given in the General Instruction and the Order of Mass."[31] The instruction continued:

> When some form of experimentation seems advisable, there is to be a precise delineation of its limits and a testing within qualified groups by prudent and specially appointed persons. Experimentation should not take place in large-scale celebrations nor be widely publicized. Experiments should be few and not last beyond a year. A report then is to be sent to the Holy See. While a reply is pending, use of the petitioned adaptation is forbidden. When changes in the structure of rites or in the order of parts as set forth in the liturgical books are involved, or any departure from the usual, or the introduction of new texts, a point-by-point outline is to be submitted to the Holy See prior to the beginning of any kind of experiment.[32]

In the years following the council, the procedure outlined in article 40 continued in use. For example, in 1969, the Consilium granted to the bishops of India a rescript for liturgical adaptations to the Indian culture.[33] After twenty years of development, on 30 April 1988, the Congregation for Divine Worship confirmed adaptations made to the *Ordo Missae*, the *praenotanda*

[31] SACRED CONGREGATION FOR DIVINE WORSHIP, instruction *Liturgicae instaurationes* on the orderly implementation of the Constitution on the Liturgy, 5 September 1970, n. 12, in *AAS*, 62 (1970), 703; *DOL* 530.

[32] Ibid.

[33] CONSILIUM, Rescript on liturgical adaptations to Indian culture, 25 April 1969; *DOL* 489.

of the Roman Missal, and the particular calendar proposed by the bishops of Zaire (now the Democratic Republic of Congo).[34] Not long after, the congregation permitted a group of Afro-Brazilian bishops "to begin investigating the possibility of adapting the *editio typica* of the Roman Missal to incorporate Afro-Brazilian cultural elements."[35]

2.5 — The 1994 Instruction *Varietates legitimae*

Twenty-four years after *Liturgicae instaurationes*, the Congregation for Divine Worship and the Discipline of the Sacraments issued a fourth instruction for the correct implementation of *Sacrosanctum concilium*. Unlike its predecessors, *Varietates legitimae* focused on only articles 37–40 of the liturgy constitution.[36] The stated purpose of the instruction is to explain more precisely the principles articulated in articles 37–40 and to provide directives for the correct procedure to be followed to implement them.[37]

In nn. 52–61 of the instruction, the congregation explores how conferences of bishops can employ the foreseen adaptations provided in the liturgical books to adapt "the liturgy to the mentality and needs of different peoples."[38] Curiously, however, the procedure for submitting the adapted liturgical books to the congregation mentions that, in addition to the acts and vote of the conference signed by the president and secretary and two copies of the approved text, the dossier submitted to the dicastery is to include "a succinct and precise explanation of the reasons for the adaptations that have been introduced." However, the congregation itself has approved those specific adaptations, found in the *praenotanda* of each revised ritual book, from which a conference of bishops can choose none, one, or all to introduce in its territory. If these foreseen adaptations have been pre-approved by the congregation, it is difficult to see why the congregation requires "a succinct and precise explanation of the reasons for the adaptations that have been introduced"—unless it is to judge that a conference's reasons are not persuasive for adopting a foreseen adaptation and, thus, deny its use. Such a course

[34] Prot. N. 1520/85; *Notitiae*, 263 (June 1988), 393.

[35] *BCL Newsletter*, 26 (April–May 1990), in BISHOPS' COMMITTEE ON THE LITURGY, *Thirty-Five Years of the BCL Newsletter 1965–2000*, Washington, D.C., United States Conference of Catholic Bishops, 2004, 1200.

[36] CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, instruction *Varietates legitimae* for the right application of the conciliar Constitution on the Liturgy, nn. 37–40, 25 January 1994, in *AAS*, 87 (1995), 288–314. English translation in *Origins*, 23 (4 April 1994), 745, 747–756.

[37] Ibid., n. 3, in *AAS*, 87 (1995), 288–289; *Origins*, 23, 747.

[38] Ibid., n. 52, in *AAS*, 87 (1995) 307; *Origins*, 23, 753.

of action would contravene *Sacrosanctum concilium* 39 but confirm those who raise concerns about the micromanagement style of the Roman curia.[39] Furthermore, if even adaptations foreseen in the liturgical books require a reason to be adopted by a conference of bishops, then the Roman bias against adaptations and inculturation, found elsewhere in the instruction, is reinforced.[40]

In the final section of the instruction, the congregation turns to those adaptations addressed in article 40 of *Sacrosanctum concilium*. Before proceeding to the procedure to be followed concerning these more profound adaptations, the instruction establishes two principles. In the first, the instruction clarifies a presupposition: before proposing more profound adaptations, a conference of bishops will have "exhausted all the possibilities of adaptation offered by the liturgical books; that it has made an evaluation of the adaptations already introduced and maybe revised them before proceeding to more far-reaching adaptations."[41] Second, the congregation repeats a principle stated earlier in the instruction: "Adaptations of this kind do not envisage a transformation of the Roman rite but are made within the context of the Roman rite."[42]

In five steps, the congregation lays out the procedure conferences of bishops are to follow if they want to propose any article 40 adaptations. First, the conference "will examine what has to be modified in liturgical celebrations because of the traditions and mentality of peoples," involving the national or regional liturgical commission, neighboring conferences or those with the same culture in this study.[43] Next, before any experimentation can take place, the conference of bishops presents its proposal to the Congregation

[39] See, for example, John R. QUINN, *The Reform of the Papacy: The Costly Call to Christian Unity*, New York, Crossroad Publishing, 1999, 167; Hilari RAGUER, "An Initial Profile of the Assembly," in ALBERIGO-KOMONCHAK, II: 210–211.

[40] See, for example, *Varietates legitimae* 33, in *AAS*, 87 (1995), 301; *Origins*, 23, 751: "As particular churches, especially the young churches, deepen their understanding of the liturgical heritage they have received from the Roman church which gave them birth, they will be able in turn to find in their own cultural heritage appropriate forms which can be integrated into the Roman rite where this is judged useful and necessary.

"The liturgical formation of the faithful and the clergy, which is called for by the constitution *Sacrosanctum concilium*, ought to help them to understand the meaning of the texts and the rites given in the present liturgical books. *Often this will mean that elements which come from the tradition of the Roman rite do not have to be changed or suppressed*" (emphasis added).

[41] Ibid., n. 63, in *AAS*, 87 (1995), 312; *Origins*, 23, 754.

[42] Ibid.

[43] Ibid., n. 65, *AAS*, 87 (1995), 312; *Origins*, 23, 754.

for Divine Worship and the Discipline of the Sacraments. The dossier submitted to the congregation is to include:

- a description of the innovations proposed;
- the reasons for making the adaptations and the criteria used;
- the times and places chosen for a preliminary experiment, along with an indication of which groups will make it;
- the acts of the discussion and the vote of the conference.[44]

Third, working with the conference, the congregation will examine the proposal and grant the conference "a faculty to make an experiment for a definite period of time, where this is appropriate."[45] It is the responsibility of the conference of bishops—assisted by the national or regional liturgical commission—to supervise the approved experiments.

> The conference will also take care to ensure that the experimentation does not exceed the limits of time and place that were fixed. It will also ensure pastors and the faithful know about the limited and provisional nature of the experiment, and it will not give it publicity of a sort which could have an effect on the liturgical practice of the country.[46]

Fourth, when the period of experimentation concludes, the conference determines whether the results have met "the goal that was proposed or whether it needs revision."[47] Along with a complete report on the experiment, the conference sends its conclusions to the congregation. Finally, "after examining the dossier, the congregation will issue a decree giving its consent, possibly with some qualifications, so that the changes can be introduced into the territory covered by the episcopal conference."[48] The procedural section of the instruction concludes with the important reminder that all the Christian faithful—both cleric and lay—are to be "well informed about the changes and prepared for their introduction into the liturgical celebrations."[49]

2.6 — Canon 838 §2 after *Magnum principium*

Whereas canon 838 §3 stipulated that the Apostolic See's prior *recognitio* applied to those vernacular translations of liturgical books "adapted

[44] Ibid., n. 66, in *AAS*, 87 (1995), 313; *Origins*, 23, 754.
[45] Ibid.
[46] Ibid., n. 67, in *AAS*, 87 (1995), 313; *Origins*, 23, 754–755.
[47] Ibid., n. 67, in *AAS*, 87 (1995), 313; *Origins*, 23, 755.
[48] Ibid., n. 68, in *AAS*, 87 (1995) 313; *Origins*, 23, 755. As will be discussed below, what the *Origins* translation renders as "decree of consent," the official Latin text states is "approbationis decretum."
[49] Ibid., n. 69, in *AAS*, 87 (1995), 313; *Origins*, 23, 755.

appropriately within the limits defined in the liturgical books themselves," i.e., *Sacrosanctum concilium* 39's foreseen adaptations only, the text of canon 838 §2, modified by Pope Francis in *Magnum principium*, states that the Apostolic See reviews adaptations approved by the conference of bishops *ad normam iuris*. At first glance, it would appear that, because of the omission of the phrase "within the limits defined in the liturgical books themselves," conferences of bishops are no longer restricted in adapting liturgical books. Indeed, this seems to be the will of the supreme legislator, because he expressly states in the motu proprio his desire to clarify "the competency of the Apostolic See surrounding the translation of liturgical books and *the more radical adaptations established and approved by Episcopal Conferences*."[50]

3 — *Implications of the Modification to Canon 838 §2*

The modifications to canon 838 §§2 and 3 effected by the motu proprio of Pope Francis raise a number of implications for the adaptation of liturgical books by conferences of bishops. I will focus on two.

1. The Holy Father himself raises the first implication of the modification of canon 838: the interpretation of other laws affected by the changes in paragraphs 2 and 3. "Consequently this is how art. 64 §3 of the Apostolic Constitution *Pastor bonus* as well as other laws are to be interpreted, particularly those contained in the liturgical books concerning their revision."[51] *Pastor bonus*, art. 64 §3 states that the Congregation for Divine Worship and the Discipline of the Sacraments "grants the *recognitio* to translations of liturgical books and their adaptations that have been lawfully prepared by conferences of bishops." Inasmuch as liturgical books adapted by conferences

[50] *Magnum principium*; emphasis added.

When the motu proprio was published on 9 September 2017, the Congregation for Divine Worship and the Discipline of the Sacraments published a note entitled "Canon 838 in Light of Conciliar and Post-Conciliar Sources." Concerning the modified paragraph 2, the congregation asserts: "The reference here is to *Sacrosanctum concilium* n. 36 §3. The adjustment to §2 maintains can. 1257 of the 1917 C.I.C. among its sources, and adds the reference to the Instruction *Varietates legitimae* which deals with the application of nn. 39 & 40 of *Sacrosanctum concilium* for which a full 'recognitio' is required." Inasmuch as *SC* 36 was rightly a source for the text of canon 838 §2 when it included the vernacular translations, it seems absurd to include *SC* 36 §3 as a source for the revised paragraph 2, which has nothing to do with a conference's decision on "whether and to what extent the vernacular is to be used" in the liturgy. See *SC*, 36 §3, in *AAS*, 56 (1964), 109–110; *DOL*, 36.

[51] *Magnum principium*.

of bishops still receive the *recognitio* of the congregation according to the modified paragraph 2, no change in interpretation is needed for this phrase in article 64 §3. However, in the anticipated revision of *Pastor bonus*, the present article 64 §3 will need to be revised to distinguish between the different interventions made by the dicastery: the *recognitio* for adaptations in the liturgical books approved by the conference of bishops and the *confirmatio* for the vernacular translation of liturgical texts.

2. Published with the motu proprio on 9 September was a text by Archbishop Arthur Roche, Secretary of the Congregation for Divine Worship and the Discipline of the Sacraments, entitled "A Key to Reading the *Motu Proprio* 'Magnum Principium'." Among his comments, Archbishop Roche stated:

> In the encounter between liturgy and culture the Apostolic See is called to *recognoscere*, that is, to review and evaluate such adaptations in order to safeguard the substantial unity of the Roman Rite: the references for this material are *Sacrosanctum concilium* nn. 39-40; and its application, when indicated in the liturgical books and elsewhere, is regulated by the Instruction *Varietates legitimae*.[52]

We have seen that the 1994 instruction on inculturation and the Roman liturgy set forth a procedure for conferences of bishops to introduce unforeseen adaptations in the liturgy. Nowhere in that procedure is there a reference to the *recognitio* of the congregation. Because the instruction endeavored to fill out the process established in *Sacrosanctum concilium* 40, the document is faithful to its conciliar source: the congregation grants its consent to proposals from conferences of bishops to introduce more profound adaptations in the liturgy in their respective territories.

Now, however, that the congregation's review has been extended to *all* adaptations—those both foreseen and unforeseen in the liturgical books—a question is raised about the juridic standing of the instruction's procedure and, more specifically, of the consent granted by the congregation to a conference's proposal. While it is safe to say that the procedure specified in numbers 65–69 of *Varietates legitimae* remains in effect with the modification in canon 838 §2, the same cannot be said for the consent of the dicastery concerning more profound adaptations proposed by conferences of bishops. This conclusion gets to the nature of the Holy See's intervention vis-à-vis liturgical books adapted by the conference of bishops and the distinction between consent and *recognitio*.

[52] Archbishop Arthur ROCHE, "A Key to Reading the *Motu Proprio* 'Magnum principium'," 9 September 2017, Bulletin of the Press Office of the Holy See, http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2017/09/09/170909a.html (25 February 2018).

Before discussing the nature of consent, it must be pointed out that, while *Sacrosanctum concilium* 40 uses the term *consent* to describe the nature of the Apostolic See's intervention with regard to proposals from a conference of bishops, the Latin text of *Varietates legitimae* 68 uses *approbatio* (approval). To consent means to agree, approve, or permit some act or purpose.[53] In granting consent, an ecclesiastical superior states his or her agreement with or approval of what has been proposed or recommended by a lower level individual or entity. As Ulrich Rhode has observed, consent or approval admits of a certain ambiguity. It can mean either that the superior consents to something for which someone else will be responsible or, alternately, the superior makes a determination concerning that which has been proposed by another.[54] Of course, Rhode's second meaning is operative in *Sacrosanctum concilium* 40 and *Varietates legitimae* 68.

On the other hand, in the words of the Pontifical Council for Legislative Texts, the *recognitio* is "an examination or a careful and detailed review, in order to judge the legitimacy and the congruity with the universal canonical or liturgical norms of the relative texts which the episcopal conferences seek to promulgate or publish."[55] During the code revision process, an emendation concerning the *recognitio* was proposed for what became canon 838 §2 in the 1983 Code of Canon Law. In an often-cited response, the code commission secretariat stated: "This *recognitio* is not only a kind of formality, but an absolutely necessary act of the power of governance (so that if it is lacking, the act of the inferior would have no value whatsoever) and because of that it can impose modifications, even substantial ones, in the law or decree presented for review."[56] These two juridic institutes are further

[53] *Black's Law Dictionary*, 9th ed., s.v. "Consent."

[54] Ulrich RHODE, "Die 'Recognitio' von Statuten, Dekreten und liturgischen Büchern," in *Archiv für katholisches Kirchenrecht*, 169 (2000), 441–442: "Daß jemand etwas „approbiert" bzw. „gutheißt", kann bedeuten, daß er sein Einverständnis zu etwas gibt, das an sich von jemand anderem verantwortet wird; es kann aber auch bedeuten, daß er selbst etwas beschließt, das von jemand anderem nur vorgeschlagen worden war."

[55] PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Letter to the Secretary of State, 4 December 1997, quoted in idem, "La natura giuridica e l'estensione della «recognitio» della Santa Sede," 28 April 2006, n. I, 4, in *Communicationes*, 38 (2006), 11; English translation in *Studies in Church Law*, 4 (2008), 29.

[56] PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens synthesim animadversionum ab E,.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis*, Vatican City, Typis Polyglottis Vaticanis, 1981, 93: "Quae *recognitio* non est tantum formalitas quaedam, sed actus potestatis regiminis, absolute necessarius (eo deficiente actus inferioris nullius valoris est) et quo imponi possunt modificationes, etiam substantiales in lege vel decreto ad recognitionem praesentato." English translation adapted

distinguished, in that the *recognitio* presupposes and stands upon the valid act of a lower authority, which is not the case with consent. When the superior consents to a proposal from a lower authority, the consent is the only juridic act that brings the proposal into force. Applying these distinctions to the adaptation of liturgical books, the consent granted by the Apostolic See is the act by which the unforeseen liturgical adaptations validly become law in the territory of the conference of bishops. Heretofore, the conference has simply proposed adaptations, inasmuch as it lacked the power to enact them itself. The *recognitio* granted formerly to adaptations made within the limits defined in the liturgical books and now granted to all adaptations made to these books is a response to a valid act of the conference of bishops. The Holy See's decree does not change this.

Moreover, "the *recognitio* is an element that manifests, from the part of the one who requests it and of the one who grants it, an expression of communion which declares that the bishops have acted in *hierarchical communion*."[57] In general, the superior granting consent need have no relationship—preexisting or otherwise—with the entity making a proposal. Finally, in distinguishing consent and the *recognitio*, it must be remembered that, because consent functions much like an act of approval, it has greater legal weight than the *recognitio*.[58]

By means of *Magnum principium*, Pope Francis has modified canon 838 §§ 2 and 3. Whereas *Sacrosanctum concilium* 40 required the Apostolic See to *consent* to more profound adaptations proposed by a conference of bishops before they could be introduced in the liturgy, the Holy Father now requires that such adaptations receive the *recognitio* of the Apostolic See—which is a different juridic institute from that of consent. The question for canonists is this: What is the juridic status of the consent of the Apostolic See required by *Sacrosanctum concilium* 40 and, equivalently, by *Varietates legitimae* 68, for the unforeseen adaptation of liturgical books by conferences of bishops?

Canon 20 states: "A later law abrogates, or derogates from, an earlier law if it states so expressly, is directly contrary to it, or completely reorders the entire matter of the earlier law." Patricia Smith, O.S.F., who wrote her dissertation on this canon, has observed that integral reordering can never be

from Julio MANZANARES, "Papal Reservation and *Recognitio*: Considerations and Proposals," in *The Jurist*, 52 (1992), 233.

[57] PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, "La natura giuridica e l'estensione della «recognitio»," n. II, 2, in *Communicationes*, 38 (2006), 13; English translation in *Studies in Church Law*, 4 (2008), 33.

[58] See MANZANARES, 238.

presumed but must be proven.[59] Therefore, let me attempt briefly to show that the Holy Father's modification of canon 838 §2 has integrally reordered the nature of the Apostolic See's intervention articulated in *Sacrosanctum concilium* 40. First, the subject matter of *Sacrosanctum concilium* 40 and the modified phrase of canon 838 §2 is the same: the adaptation of liturgical books by the conference of bishops. Second, and without expressly stating it, the Holy Father's decision to require the Holy See's *recognitio*—rather than its consent—when a conference of bishops desires to introduce unforeseen adaptations in the liturgical books in its territory has relaxed the conciliar law, for consent carries greater juridic weight than the *recognitio*. Smith notes that "integral reordering is indicated when later norms are more open and flexible, promoting subsidiarity or allowing pastoral leaders to exercise prudent judgment in the implementation of a law."[60] By extending the Apostolic See's *recognitio* in canon 838 §2 to unforeseen adaptations in the liturgical books, Pope Francis is promoting the principle of subsidiarity, in that conferences of bishops can now themselves validly enact decrees concerning such adaptations, not merely propose them to the congregation.

Conclusion

The Holy Father's modification of canon 838 §2 has integrally reordered the law pertaining to the unforeseen adaptation of liturgical books, derogating from *Sacrosanctum concilium* 40's requirement that the Apostolic See grant its consent to proposals made by a conference of bishops for these adaptations. It should also be noted that, insofar as the law requiring the Holy See's consent to such adaptations has ceased, the similar provision in the instruction *Varietates legitimae* also lacks force, as canon 34 §3 prescribes.[61]

Two final observations are in order. First, in the motu proprio, the Holy Father expresses his desire to reaffirm and put into practice principles handed on since the Second Vatican Council.[62] However, one cannot help but note that the extension of the *recognitio* of the Apostolic See to unforeseen

[59] See Patricia SMITH, "Determining the Integral Reordering of Law: Tools for the Canonist," in *Studia canonica*, 35 (2001), 124–125.

[60] Ibid., 128.

[61] 1983 code, c. 34 §3: "Instructions cease to have force not only by explicit or implicit revocation of the competent authority who issued them or of the superior of that authority but also by the cessation of the law for whose clarification or execution they were given."

[62] *Magnum principium*: "Quamobrem, ut instauratio totius vitae liturgicae recte pergat, visum est aliqua principia inde a Concilio tradita clarius iterum affirmari et in usu adhiberi."

adaptations approved by the conference of bishops surpasses even what the Preparatory Commission on the Sacred Liturgy, the Central Preparatory Commission, and the conciliar fathers themselves approved. I leave it to scholars of the liturgy and the law to explore the ramifications of this change.

Second, Pope Francis states in *Evangelii gaudium* that "excessive centralization, rather than proving helpful, complicates the Church's life and her missionary outreach."[63] Quoting *Lumen gentium* 23, the Holy Father observes that conferences of bishops "are in a position 'to contribute in many and fruitful ways to the concrete realization of the collegial spirit'," even if this has not been sufficiently explained.[64] The *magnum principium* of *Sacrosanctum concilium* to which Pope Francis refers at the beginning of the motu proprio is the accommodation of liturgical prayer to the comprehension of the people. Perhaps just as important, however, is the ecclesiological principle of decentralization concerning the regulation of the liturgy. The Holy Father's modification to canon 838 §2 is but one of his contributions to make concrete the collegial spirit of conferences of bishops.

[63] Pope FRANCIS, *Evangelii gaudium*, n. 32, in *AAS*, 105 (2013), 1034.
[64] Ibid., in *AAS*, 105 (2013), 1033.

Studia canonica 52 | 2018, 103-138
doi: 10.2143/STC.52.1.3285215

THE RIGHT TO ADMINISTRATIVE JUSTICE IN RELIGIOUS INSTITUTES

JUSTIN E.A. GLYN, SJ*

SUMMARY — This article examines the general canonical principles which are applicable to decision-making in religious institutes. After situating these decisions in canonical context, it considers the nature of the authority exercised by religious superiors and the application of the general principles of administrative law to decision-making in religious institutes. It then illustrates this application using two particular examples as paradigms of administrative decision making: the decision to grant or refuse temporary profession in a religious institute and the transfer of a religious from one house to another. Finally, it gives an overview of the potential remedies available to people who feel themselves aggrieved by a superior's decision.

RÉSUMÉ — Cet article est un examen des principes canoniques généraux qui s'appliquent à la prise de décision dans les instituts religieux. Après avoir situé ces décisions dans un contexte canonique, il considère la nature de l'autorité exercée par les supérieurs religieux et l'application des principes généraux du droit administratif à la prise de décision dans les instituts religieux. Il illustre ensuite cette application en utilisant des exemples particuliers comme paradigmes de la prise de décision administrative : celle d'accorder ou de refuser la profession temporaire dans un institut religieux et le transfert d'un religieux d'une maison à une autre. Finalement, il donne une vue d'ensemble des remèdes qui sont disponibles aux personnes qui se sentent lésées par une décision du supérieur.

* Ph.D in law (administrative law and international law relating to refugees) from the University of Auckland in 2008. B.Theol (Hons) (2012) and Master of Theological Studies (2016) from the University of Divinity (Melbourne). Ordained priest in 2016. Masters in Canon Law/JCL at Saint Paul University in 2018.

1 — *Introduction*

The vow of obedience, as one of the evangelical counsels, is a hallmark of religious life in general and religious institutes in particular (*CIC*, cc. 573 §1, 607 §2; *CCEO*, c. 410).[1] Despite their vowed state, however, members of religious institutes remain members of the general body of the Christian faithful and, as such, can "legitimately vindicate the rights which they possess in the Church in the competent ecclesiastical forum according to the prescripts of the law applied with equity" (c. 221 §1). Indeed, canon law has much to say about the relationship between superior and subject in an ecclesial context and the way in which power is to be exercised. It follows that, although members of religious institutes are parties to hierarchical relationships, acts of superiors cannot be arbitrary but must respect rights on the part of their subjects which are recognised and governed by law.

One area where issues of administrative justice may arise has undoubtedly been much in the public mind of late. This is in relation to administrative penalties or other disciplinary measures, the ongoing revelations of sexual abuse within the Church and the rights which victims, accused and religious institutes have vis a vis each other. Like an iceberg, though, much administrative decision making passes unseen beneath this very public sphere, especially where it is not explicitly penal or disciplinary in character. While not matters of punishment or discipline *per se*, acts such as admitting a novice, allowing him or her subsequently to proceed to vows, moving a religious from one house to another, advancing him or her through the stages of formation, applying a member to a specific apostolate or exclaustration (among many others) just as surely involve administrative actions and concomitant rights and may have significant impacts on individuals.

To date there have been few, if any, studies considering the right to administrative justice in general to religious institutes (although there are several discussions relating to particular areas, especially penal law). Superiors (and those advising them) have therefore had relatively little guidance on the proper bases of, and formal requirements for, administrative action in the context of a religious institute and the avenues for redress open to a member who feels him or herself to be wronged by a superior's act. This article attempts to remedy this lacuna by considering the basic principles of just administrative action in religious institutes: the nature of the authority of superiors over their subjects, the application of canonical administrative principles to action in religious institutes and the remedies available for

[1] All references to canons will be to those in the *CIC*, unless otherwise stated.

justice denied. While it will hopefully serve as a helpful contribution to the discussion, it will (of necessity) be an outline only.

Having briefly introduced the relevant principles, we shall discuss the executive authority of superiors in religious institutes and the provisions of the law safeguarding fair procedures including the content of subjects' general rights to administrative justice. These conclusions will then be used to attempt to formulate general principles for just administrative action. Exclusions of members from perpetual profession and reassignment within the institutes will then be considered as paradigmatic applications of these principles. Finally, the article briefly considers the remedies available to persons who consider themselves aggrieved by a religious superior's administrative act and finally offers suggestions as to areas for future studies which might arise from this brief article. While the focus will mostly rest on the Latin Church, this article will note relevant features of Eastern canon law and practice where these are significantly different.

2 — *Administrative Acts and Rights in General*

This section aims to chart the scope of administrative action relevant to religious institutes. After briefly situating superiors' decision making within the canonical schema of administrative acts, it considers the nature of executive authority which religious superiors possess. Finally, it discusses the major legal constraints on superiors' administrative action, focusing on general obligations of a superior and rights of the subject in relation to the placing of an act. Specific rights to challenge an administrative act once it has been placed will be dealt with in section four.

2.1 — Classification of Administrative Acts

Administrative acts are not placed in a vacuum. For legality, and occasionally for validity, they may require preliminary steps to be taken by the authority in order to safeguard the rights of those affected or to ensure that the act is appropriate. John Huels therefore uses the term "administrative activity" to cover both administrative acts themselves and the enquiries or other actions which precede and surround them.[2] This term is attractive as it includes and subsumes the general norms in cc. 50 and 51 which William

[2] John M. HUELS, "Administrative Acts and Activity in Canon Law," in *The Canonist*, 6 (2015), 65. (=HUELS, "Administrative Acts and Activity in Canon Law")

Daniel describes as "the general administrative procedure".[3] Vital though this procedure is, there are, of course, many other safeguards on the justice of administrative action, including, for instance, the warning or consultation of affected parties, seeking advice from consultative bodies or enquiries as to whether an act is appropriate.[4]

Turning to the acts themselves, it is clear that most acts of religious superiors vis a vis their subjects will be aimed at particular individuals, i.e. singular administrative acts (c. 34) and include such important matters as admitting novices to vows, transfers and exclaustrations. Among singular administrative acts (governed by the general norms contained in cc. 35-47 or *CCEO* cc. 1510-1516, as applicable),[5] the principal division which both the Codes recognise is between rescripts (and analogous oral actions) by which a favour is granted on the one hand and singular administrative decrees (which impose a penalty or precept or make some other kind of provision or decision) on the other.[6] Daniel argues that the current Codes' distinctions are too rigid: he proposes a more nuanced division between decisions, provisions, precepts and rescripts.[7] While it is true, as Szabolcs Szuromi points out, that the current law reflects a broad and uneasy grouping of a number of very ancient phenomena,[8] challenging this grouping is beyond the scope of this paper (although difficulties in application will be pointed out as they arise).

Turning first to favourable acts, these may be favours *stricto sensu* – c. 59. They include favours given to specific persons (including, *inter alia*, privileges and dispensations). Aside from a rescript, a favourable act may be the subject of a decree (i.e. a provision). The key distinction between rescripts

[3] William L. DANIEL, *The Art of Good Governance: A Guide to the Administrative Procedure for Just Decision-Making in the Catholic Church*, Gratianus Collection, Montréal, Wilson & Lafleur Limitée, 2015, 101-131. (=DANIEL, *The Art of Good Governance*)

[4] E.g., cc. 50, 127, 645 §2, 689 §1, 970, 1222; HUELS, "Administrative Acts and Activity in Canon Law," 70-78.

[5] Valerian M. MENEZES, "Singular Acts of Executive Power: An Examination of Title IV of Book I of the 1983 Code," in Victor G. D'SOUZA (ed.), *In the Service of Truth and Justice: Festschrift in Honour of Prof. Augustine Mendonça, Professor Emeritus*, Bangalore, St Peter's Pontifical Institute, 2008, 390. (=MENEZES, "Singular Acts of Executive Power")

[6] HUELS, "Administrative Acts and Activity in Canon Law," 66; William L. DANIEL, "The Singular Administrative Act in Canon Law," in *StC*, 50 (2016), 202 (=DANIEL, "The Singular Administrative Act in Canon Law"); cc. 48, 49 and 59; *CCEO* c. 1510.

[7] DANIEL, "The Singular Administrative Act in Canon Law," 246-247.

[8] Szabolcs A. SZUROMI, "Canon Law Historical Background of Categories of the Canonical Singular Administrative Acts," in *StC*, 49 (2015), 643-660. See also John M. HUELS, "Determining the Correct Rules for Ambiguous Administrative Acts," in *StC*, 37 (2003), 5-54. (=HUELS, "Determining the Correct Rules for Ambiguous Administrative Acts")

and provisions is that rescripts primarily benefit the recipient alone (and thus need not be used by the recipient in the absence of some particular canonical obligation), while a provision is intended principally for the welfare of the community at large (leaving a beneficiary no choice in whether to use it or not).[9] So, in the context of administrative action in a religious institute, a superior's missioning of a man to a given community would be a rescript (and could be declined) if the intention were to accommodate his request for a sabbatical. It would be a decree making a provision (and could not be declined) if the intent were to provide a religious house with a superior in case of need. Issues of administrative justice are less likely to arise from the grant of rescripts than provisions. (The *denial* of a rescript (which confers no benefit on an individual but does decide a particular question) is, of course, a decree rendering a decision and thus open to challenge in the same way as other such decrees.)[10]

A particular category of favourable act is the *licentia*, understood in the Latin Church as a permission or authorisation.[11] Important examples are the superior's *licentia* for the valid alienation of a religious institute's property (c. 638 §3) or the Holy See's *licentia* for transfer between religious and secular institutes (c. 684 §5). Under the Latin Code at least, a *licentia* may be a rescript or a provision.[12] In either case, however, *licentiae* are subject to the rules on rescripts (c. 59 §2).

In contrast to favourable acts, coercive measures (which may only be taken by decree) may be either decisions or precepts. Relevant decisions (unilateral executive judgments made relating to a particular set of facts),[13] include dismissal of members,[14] penal or other disciplinary processes[15] or

[9] *CIC* 71; MENEZES, "Singular Acts of Executive Power," 404; DANIEL, "The Singular Administrative Act in Canon Law," 193-194, HUELS, "Determining the Correct Rules for Ambiguous Administrative Acts," 35, 38-39; DANIEL, *The Art of Good Governance*, 28.

[10] DANIEL, "The Singular Administrative Act in Canon Law," 230-231; cc. 208, 221; *CCEO* cc. 11, 24.

[11] John M. HUELS, "Permissions, Authorizations and Faculties in Canon Law," in *StC*, 36 (2002), 44. (=HUELS, "Permissions, Authorizations and Faculties in Canon Law")

[12] *CCEO* c. 1510, however, classifies the *licentia* as one species of rescript. For more on its contested nature and history, see HUELS, "Permissions, Authorizations and Faculties in Canon Law," 25-58; MENEZES, "Singular Acts of Executive Power," 419-423.

[13] Canon 48; *CCEO* c. 1510 §2 1°; HUELS, "Administrative Acts and Activity in Canon Law," 69; DANIEL, "The Singular Administrative Act in Canon Law," 202-210.

[14] Canons 653 §1, 696; *CCEO* cc. 461, 500.

[15] Canon 1720; *CCEO* c. 1486. For a detailed analysis of non-penal disciplinary proceedings in religious institutes, see Michael F. ROSINSKI, Due Process to be Followed in the Administration of Discipline in Religious Institutes according to the Code of Canon Law, JCD Thesis, St. Paul University, Ottawa, 2016, 137-223. (=ROSINSKI, Due Process)

removal from office.[16] Not all decisions, of course, are unfavourable—the resolution of an hierarchical recourse (discussed in section four) is itself an administrative decision. Precepts (direct commands, with or without a penalty attached) may also be applied by religious superiors, particularly if they are Ordinaries.[17]

2.2 — Authority of Religious Superiors to Place Administrative Acts

Having considered the broad categories into which an administrative act may fall, it is important to determine what authority religious superiors have to place such acts. Clearly some form of authority is exercised by religious superiors, illustrated most graphically by the vow of obedience. Its exact nature, however, is the subject of some debate. Bishops, who exercise certain powers with regard to institutes of diocesan right, and major superiors of clerical religious institutes of pontifical right, both being Ordinaries, are expressly said by the Code to have ordinary executive power (and hence the power to place administrative acts).[18] The position of other superiors is less straightforward. At first sight, c. 596 §2's description of clerical religious superiors' power of governance as being additional to (*insuper*) the powers possessed by all superiors, coupled with cc. 129 §1 and 274 (providing that clerics are suitable (*habilis*) to exercise the power of governance and restricting the acquisition of offices entailing such power to them) suggests that the power possessed by non-clerics is something less than ordinary executive power. It is certainly true that some acts of executive power (e.g. those to grant dimissorial letters for their members or to give the faculty to hear confessions) are beyond the remit of lay superiors.[19] It is also true that the authority of lay religious superiors was traditionally called *potestas dominativa*, a category distinct from governance. This distinction has, however, been abrogated as part of the broader argument over lay exercise of executive power. A number of factors have contributed to this abrogation. These include various concessions given to religious since the 1960s, the subsequent revisiting of the nature of authority in religious institutes by the drafters of the Code (in discussion with the Congregation for the Doctrine

[16] Canon 190; *CCEO* c. 972; DANIEL, "The Singular Administrative Act in Canon Law," 210.

[17] Canons 48; 59 §2; 1319; *CCEO* cc. 1406, 1510 §2 1°, 2°, c. 1513 §5; DANIEL, "The Singular Administrative Act in Canon Law," 222-228; HUELS, "Administrative Acts and Activity in Canon Law," 69.

[18] Canon 134 §1; *CCEO* c .984 §2. Rose M. MCDERMOTT, "Institutes of Consecrated Life," in *CLSA Comm2*, 762.

[19] *CLSGBI Comm,* 328.

of the Faith) in the light of *Perfectae caritatis* and the apostolic exhortation *Evangelia testificatio* (which conceive superiors' authority as both personal and exercised in a spirit of dialogue) and the power which lay people now have to co-operate in the exercise of governance (c. 129 §2).[20] This history, and the apparently deliberately ambiguous wording of c. 596 which emerged as a result—which no longer qualifies *potestas* as *dominativa*—has led a growing number of authors to argue that lay people (including religious) can at least place those administrative acts necessary for carrying out their offices (including giving and receiving delegations to perform such acts), even if they may lack the general ability (*habilitas*) to govern a section of the people of God.[21] On this new understanding, the authority of lay superiors under c. 596 §1 is part of their cooperation in the exercise of governance.[22] *CCEO* c. 441 §2 makes this reading explicit in the case of the Eastern Churches. Accordingly, *potestas dominativa* as a separate category of power for religious superiors seems a superfluous concept in the light of the broad terms of the grant in c. 596 §1. As Elizabeth McDonough notes, even if one were to claim some continuing existence for *potestas dominativa*, c. 596 §3's application to c. 596 §1 of the canons relating to the exercise of ordinary executive power would seem to put beyond doubt that the acts superiors may place under c. 596 §1 are, for all intents and purposes, exercises of ordinary executive power, whether the superior is lay or ordained and whatever the institute's status.[23] In what follows, therefore, this study assumes that the provisions relating to administrative acts and their review apply to the competent superiors of all religious institutes.

[20] SECOND VATICAN COUNCIL, Decree on the Sensitive Renewal of Religious Life *Perfectae caritatis*, 28 October 1965, in *AAS*, 58 (1966), 702-712, English translation in TANNER, 939-947; POPE PIUS V, Apostolic Exhortation on the Renewal of the Religious Life *Evangelica testificatio*, 29 June 1971, in *AAS*, 63 (1971), 497-526, English translation in FLANNERY2, 680-706; Maryanne CONFOY, *Religious Life and Priesthood: Perfectae caritatis, Optatum totius, Presbyterum ordinis*, New York, Paulist Press, 2008, 224-254.

[21] Elizabeth M. COTTER, The General Chapter in a Religious Institute, with Particular Reference to IBVM, Loreto Branch, JCD Thesis, St Paul University, Ottawa, 2006, 71-83; 94-128; Elizabeth MCDONOUGH, "Jurisdiction Exercised by Non-Ordained Members in Religious Institutes", in *CLSAP*, 58 (1996), 292-307 (=MCDONOUGH, "Jurisdiction Exercised by Non-Ordained Members in Religious Institutes"). John M. HUELS, "The Power of Governance and its Exercise by Lay Persons: A Juridical Approach," in *StC*, 35 (2001), 86-96.

[22] For a list of competencies possessed by all superiors (lay or clerical), see MCDONOUGH, "Jurisdiction Exercised by Non-Ordained Members in Religious Institutes", 306.

[23] MCDONOUGH, "Jurisdiction Exercised by Non-Ordained Members in Religious Institutes", 306-307.

2.3 — General Constraints on Administrative Action

Having determined that religious superiors can place administrative acts and the broad categories of such acts, it becomes necessary to determine the constraints which bind them in doing so. These constraints concern the decision to place the act at all and the formalities of the act itself.

In the first place, the superior will need to determine that the act is necessary or appropriate—the sphere of administrative activity preceding administrative acts. It may be argued that this is less of an issue in the case of favours (where no one's interests are directly prejudiced) than in the case of decrees. Still, caution is needed even here. Firstly, in granting a favour, the superior will need to determine that other people's interests are *not* in fact prejudiced and that the facts are as stated by the petitioner. Accordingly, both Codes invalidate a petitioned favour granted through subreption or obreption.[24] Even if a favour is abused by the recipient, the grantor can only revoke it after warning the holder.[25] Secondly, while the nature of the act is determined by its principal purpose, it may well have a subordinate purpose. A favour, for example, may be intended to benefit the community. To the extent that it is, the superior must verify that the benefit is actually present. The issue of multiple purposes and affected parties is particularly acute in the case of *licentiae*. As we have seen, these are treated as favours by the Latin Code but have a strong communal dimension. Here (for both the validity and liceity of the acts) the grantor needs to be certain, before the grant, that the recipient has particular qualities (for instance, the suitability to preach to religious in the case of c. 765).[26] Also, granting some *licentiae* may require the consent (at least for liceity) of third parties who may be affected.[27]

In the case of administrative decrees (whether provisions, decisions or precepts), the clear effect on third parties (individuals or communities) means that the standard the superior will have to meet to satisfy him or herself of the need for the act will, necessarily, be higher than for favours. The law may also mandate special administrative procedures in the case of particular acts.[28] In the context of religious life, these include: consultation with third

[24] Canon 63; *CCEO* c. 1529. If the act needs someone to execute it, then concealment or falsity are judged at the time of execution, otherwise the situation is judged when the favour is granted.

[25] Canons 76, 84; *CCEO* cc. 1531; 1535.

[26] HUELS, "Administrative Acts and Activity in Canon Law," 76-77.

[27] See e.g. c. 667 §4 by which the diocesan Bishop requires the assent of the abbess to admit a third party to the enclosure of a monastery of nuns within his diocese: HUELS, "Administrative Acts and Activity in Canon Law," 74.

[28] HUELS, "Administrative Acts and Activity in Canon Law," 70-78; DANIEL, *The Art of Good Governance*, 119.

parties (thus the superior is obliged to consult the local Ordinary of a secular cleric seeking entry to a novitiate – c. 644), the consent of another (e.g. that of the diocesan Bishop for the change of the apostolic works conducted in a house – c. 612), the collation of reports or the issue of reasons and warnings (as in the dismissal process in cc. 695-699, where an improperly constituted body or a lack of reasons for the dismissal will also invalidate it), the conclusion of agreements (for instance, between the superior and the diocesan Bishop for the conduct of particular diocesan works – c. 681 §2), the conduct of inspections (e.g. of religious works by the diocesan bishop – c. 683) or the fulfilment of the requirements of particular law (as, for instance, in transferring a superior – c. 624 §3). In the next section we shall consider the specific issues posed—both for validity and liceity—by a requirement to seek the consent of a body or group (c. 127).

In addition to such special procedures, however, c. 50 states that the issuer of *any* decree must seek the necessary information and proof and consult with those whose rights could be harmed.[29] This general right to procedural administrative justice (*ius ad proceduram*) is not merely a formality. It is a vital expression of the rights of all Christ's faithful to vindicate their legal rights and to be judged in accordance with law (a right not restricted to the judicial sphere).[30] It is a recognition by the legislator that administrative acts have potentially serious consequences for individuals and, accordingly, that the discernment which underpins administrative action requires a minimum level of transparency in order to be meaningful and seen to be just.[31] A hearing must therefore be genuine, allowing all affected persons (at least those whose interests would be directly harmed) to know what act is being considered and to exercise a practical right of defence.[32] While not every piece of evidence need be revealed under c. 50 (unless the law specifically requires it in a given case), the Apostolic Signatura requires that the affected party at least know the gist of the matter.[33] That said, c. 50 still

[29] Canon 50; *CCEO* c. 1517 §1.

[30] ROSINSKI, Due Process, 102; DANIEL, *The Art of Good Governance*, 117.

[31] Michael R. MOODIE, "The Administrator and the Law: Authority and its Exercise in the Code," in *Jur*, 46 (1986), 63. (=MOODIE, "The Administrator and the Law)

[32] Canon 221; *CCEO* c. 24; DANIEL, *The Art of Good Governance*, 117-118, 127-129, 147-156; Brendan DALY, "Precepts and their Application," in *The Canonist*, 6 (2015), 188-189. (=DALY, "Precepts and their Application")

[33] SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* SILVESTRINI, 5 May 1990, prot. no. 18061/86 CA, reported in William L. DANIEL, *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Gratianus Collection, Montréal, Wilson & Lafleure Limitée, 2011, 260-274 (=DANIEL, *Ministerium Iustitiae*). We consider the Signatura's role in ch.4.

only mandates a hearing "in so far as [the authority] is able" (*quantum fieri potest*). This proviso has, understandably, been criticised as allowing superiors to thwart the right to justice. As a rights-limiting clause it must be strictly interpreted (c. 18; *CCEO* c. 1500).[34] Thus, for example, mere difficulty in meeting the terms of c. 50 (e.g. the need to travel far or the length of time needed to call a person to appear at a hearing) should not suffice to invoke the limitation: genuine *in*ability (as where the person concerned has absconded and cannot be traced) should be required.

There is some disagreement as to whether c. 50, despite its unqualified scope, applies also to provisions. It seems from the canon's drafting history that provisions were not intended to be included: in addition, as Huels points out (and as discussed above), a provision, by definition, is not intended to harm others' rights.[35] That said, certain provisions do have the potential to prejudice the rights of third parties. One may consider, for example, a provision of a diocesan Bishop (under c. 681) entrusting a diocesan work to a religious institute lacking the experience or personnel to conduct it. Indeed, the potential effect on others' rights is the reason (as noted above) why certain *licentiae* in the nature of provisions explicitly require the grantor to be satisfied of the grantee's qualities. The legislator is also clearly aware of this potential for acts meant as favours to have adverse results in practice. So, c. 38 (*CCEO* c. 1515), for instance, provides that any administrative act *including a rescript* (which is favourable by definition) can derogate from acquired rights, laws or customs only if this is done expressly. In cases where provisions have the actual potential to harm third parties, it seems hard to argue that the clear wording of c. 50 should not apply—especially in light of the rule in c. 18 (noted above) that laws must be interpreted strictly, insofar as they limit rights, and broadly, insofar as they extend them.[36]

[34] This is especially true given the much stricter requirements in *CCEO* 1517 – DANIEL, *The Art of Good Governance*, 207-208; Jorge MIRAS, "Title IV: Singular Administrative Acts", in *Exegetical Comm*, 530. (=MIRAS, "Title IV: Singular Administrative Acts")

[35] See also DANIEL, *The Art of Good Governance*, 113-114; John M. HUELS, "The Efficacy of Delegation without Notification or Acceptance," in V.G. D'SOUZA (ed.), *In the Service of Truth and Justice: Festschrift in Honour of Prof. Augustine Mendonça, Professor Emeritus*, Bangalore, St Peter's Pontifical Institute, 2008, 94-95. (=HUELS, "The Efficacy of Delegation without Notification or Acceptance) By contrast, Julio García Martín would apply canon 50 to all decrees without exception: Julio GARCÍA MARTÍN, *Il Decreto Singolare*, Rome, EDIURCLA, 2004, 108. (=GARCÍA MARTÍN, *Il Decreto Singolare*)

[36] DANIEL, *The Art of Good Governance*, 117. While this should be true in theory, he recognises that the Apostolic Signatura's understanding of whose interests might be harmed has been restrictive in practice – DANIEL, *The Art of Good Governance*, 188.

While laying the basis for the act is important for avoiding the appearance of arbitrariness, for ensuring certainty and for the protection of individual rights, the formalities of the act itself are equally so. All administrative acts (at least insofar as they concern the external forum or are to be executed) must be in writing and, if they are decree-decisions, must contain at least summary reasons. Both safeguards are essential for meaningful review.[37]

Although the requirement for reasons arguably does not explicitly apply to precepts (c. 51 includes the proviso *si agatur decisionis*, "where a *decision* is concerned"), the requirement for writing does. Oral precepts are valid (if illegal) but lapse with the authority of the one imposing them and are unenforceable in the external forum.[38] In addition, despite the lack of an explicit requirement that precepts (as opposed to decisions) state reasons, penalties cannot be imposed except in accordance with law (which must be construed strictly), and just reasons are always required for penal precepts.[39] In practice, therefore, a penal precept failing to state reasons is thus likely to be null, or at least open to challenge.

It is widely agreed that failing to observe cc. 50 and 51, as with most safeguards surrounding administrative action, will not automatically invalidate an act. Non-compliance with these canons gives rise merely to a right of recourse.[40] Julio García Martín, however, argues that these are general norms suffusing and informing the more specific provisions of the Codes and that failure to follow due process invalidates an act (in the same way as failure to grant a right of defence irremediably nullifies a judicial process).[41] This is clearly too broad. We have already seen that limited effect is given to some acts in violation of cc. 50 and 51, and many day to day administrative acts in religious institutes are placed orally in practice. It is nevertheless true that the Apostolic Signatura has used the lack of reasons under c. 51 to buttress a finding of nullity of the dismissal of a religious, although in that case a special administrative procedure which demands reasons for the

[37] Canons 37, 51, 54 §2; *CCEO* cc. 1514, 1519 §2; John BEAL, "Confining and Structuring Administrative Discretion," in *Jur*, 46 (1986), 100-101. MOODIE, "The Administrator and the Law," 64 points out that the restriction of c. 51 to decisions was a qualification added only at the end of the drafting process.

[38] Canons 54 §2; 58 §2; *CCEO* cc. 1513 §5; 1519 §2; DALY, "Precepts and their Application," 189-190; 196-197.

[39] Canons 18, 221 §3; 1317-1319; *CCEO* cc. 24, 1405, 1406, 1500; DALY, "Precepts and their Application,", 197-198; MIRAS, "Title IV: Singular Administrative Acts," 533-534.

[40] MIRAS, "Title IV: Singular Administrative Acts," 535; DANIEL, *The Art of Good Governance*, 124-131; HUELS, "Administrative Acts and Activity in Canon Law," 71.

[41] Cf. c. 1620 7°; *CCEO* c. 1303 7°; GARCÍA MARTÍN, *Il Decreto Singolare*, 105-152, especially 145.

decision on pain of nullity (c. 699) was also applicable.[42] In addition to any demands of special procedures, some administrative acts *will* be invalid for non-compliance with requirements analogous to cc. 50 and 51. Juridic acts of a diocesan Bishop, for instance, must be in writing (as c. 474 requires these to be signed for validity).

Finally, the need for transparency and certainty means that decrees are not effective unless executed or communicated to the one affected, whether by handing over a copy or, if the gravest of reasons make this impossible, reading the act to the affected person in the presence of a notary or witnesses with all present signing the record.[43] Notice is only dispensed with where a person deliberately refuses to attend to hear the decision or to cooperate by signing the necessary documents.[44] Rescripts (including *licentiae*), however, are exceptional. These *can* be applied for without the recipient's knowledge and do not need to be notified, at least where no executor is needed.[45]

3 — *Practical Guidelines for Superiors' Action*

Having briefly considered the general law applicable to administrative acts and the authority of religious superiors to place such acts, we now seek to apply these to formulate practical guidelines on how to prepare for and place an administrative act, bearing in mind that administrative power, as part of the governing office of the Church, is not a matter of legalism or tyranny but is to be exercised in a way which "comports with the original apostolic zeal for the salvation of souls".[46] We shall first consider guidelines for placing an act: including the outline of the process and the administrative activity required to ensure justice (including issues of consultation). Next, we shall examine the act itself and its formalities before looking in detail at the decision making process for two particular decisions reasonably common in religious life—the decision of whether or not to allow a member of the institute to make perpetual profession and the reassignment of a member within the institute.

[42] SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* SABBATANI, 20 January 1986, prot. no. 17156/85 CA, reported in DANIEL, *Ministerium Iustitiae*, 111-136; DANIEL, *The Art of Good Governance*, 130.

[43] MIRAS, "Title IV: Singular Administrative Acts", 545-547; *CIC* c. 50; *CCEO* c. 1520 §2.

[44] Canon 56; *CCEO* c. 1520 §3; MIRAS, "Title IV: Singular Administrative Acts", 547-548; DALY, "Precepts and their Application," 190.

[45] Canons 61, 62; *CCEO* cc. 1511, 1528; HUELS, "The Efficacy of Delegation without Notification or Acceptance," 106-107.

[46] John J. COUGHLIN, "*Communio* and Administrative Justice," in *Ap*, 75 (2002), 730.

3.1 — Preparatory Activity: The Need for the Act, Hearings, Fact-finding, Consultation

Daniel distinguishes the following preliminary phases of a coercive decision: the preliminary investigation (*instruction*) which includes the gathering of proofs before proceeding so that the act can be made with a complete knowledge of the case and the appropriate procedure for dealing with the matter can be determined.[47] This is, at least conceptually, followed by the *hearing* of the parties and others and the *evaluation* of the evidence before the superior finally places the act.[48]

The situation may have come to the superior's notice by way of a formal complaint or may be contemplated by the superior as a result of his or her own observations or even as a result of an application by the member (for example to take permanent vows). Whichever is the case, the superior must first be satisfied that an act is needed or desirable—the purpose of the instruction.

The duties of superiors to secure administrative justice in explicitly coercive matters (penal and other disciplinary proceedings) are well covered in canonical literature, and this discussion is therefore restricted to a broad outline of the necessary process. In the case of penalties for delicts or non-penal discipline, the act proposed may be a penal precept (if the superior is an Ordinary) or, more usually, a decree-decision. The superior will also need to bear in mind the strict limits which canon law imposes on administrative disciplinary or penal procedures (as opposed to judicial penal procedures). The Congregation for Clergy, Congregation for the Evangelization of Peoples and Congregation for the Doctrine of the Faith possess some special faculties (which lie beyond the scope of this article) to proceed administratively against priests for offences (or, in the case of the first two Congregations, prolonged absence) and to remove them from the clerical state.[49] With these

[47] DANIEL, *The Art of Good Governance*, 139-145; MIRAS, "Title IV: Singular Administrative Acts", 527.

[48] DANIEL, *The Art of Good Governance*, 146-158; MIRAS, "Title IV: Singular Administrative Acts", 528-550.

[49] CONGREGATION FOR THE CLERGY, Special Faculties: Dismissal from the Clerical State (document and commentaries), Reported in *Canon Law Society Newsletter*, no. 160 (2009), 36-50; CONGREGATION FOR THE EVANGELIZATION OF PEOPLES, Special Faculties to the Congregation for the Evangelization of Peoples, Reported in *SCL*, 5 (2009), 69-78; CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Normae de gravioribus delictis*, 21 May 2010, in *AAS*, 102 (2010), 419-430, English Translation in John A. RENKEN, *The Penal Law of the Roman Catholic Church: Commentary on Canons 1311-1399 and 1711-1731 and Other Sources of Penal Law*, Ottawa, Faculty of Canon Law, St Paul University, 2015, 462-477, art. 21. (=RENKEN, *The Penal Law of the Roman Catholic Church*)

exceptions, however, dismissal from the clerical state or excommunication can only be imposed judicially. In addition, perpetual expiatory penalties or unlimited *latae sententiae* suspensions cannot be established by precept.[50]

Whether the matter is disciplinary or penal, it will need to be formally instructed. Both the instruction and hearing will usually be governed by special administrative procedures such as those dealing with dismissal from an institute or by the broad terms of an administrative penal process (whether using general coercive processes in the Codes or under the provisions of particular law).[51] The instruction, in the case of penal or disciplinary sanctions, will consist of an initial inquiry to determine the threshold question of whether there is enough evidence to proceed against the member in respect of the alleged offence. Since the act is explicitly coercive in nature, the rights of the member which are at stake (such as membership of the institute or freedom from unjust punishment) will generally be clear. As warnings will have to be given for the validity of certain proceedings (such as the dismissal of a member, e.g. c. 697, 2˚ and 3˚), the parties may even be aware of the issues before a formal instruction begins. The hearing, unlike the instruction, is designed not so much to inform the superior of the basis of the decision but to provide the accused with a right of defence (which may result in a change of the superior's mind). This right includes the right to be *informed* of the charges and proposed action, the right to be *heard* in relation to them and (in the case of penal proceedings) a right of *appeal* (assisted by an advocate, if necessary) in order to fully inform the superior and ensure that the accused's view is properly put before his or her interests are affected. Accordingly, the administrative activity preceding the superior's decision (the act itself) will look similar to a judicial process. Evidence will have to be gathered (potentially under oath) and the parties heard by the superior or a delegated judge or other official—sitting with two assessors, if the matter is penal. Canonical standards of proof apply to the proceedings, and the superior will need moral certainty of the member's guilt (similar to proof beyond reasonable doubt in common law systems of proof) in the evaluation phase in order to reach the final decision to impose a penalty (cf. c. 1608).[52]

[50] Canons 1312, 1317, 1319, 1334 §2, 1341, 1425. The *CCEO* is more restrictive in some respects, cc. 1084; 1402, 1406, 1432 §2; ROSINSKI, Due Process, 158-160; RENKEN, *The Penal Law of the Roman Catholic Church*, 54-68; 114; DALY, "Precepts and their Application," 187-188, 193-195; Brian T. AUSTIN, "Due Process of Law and the USCCB Essential Norms," *StC*, 51 (2017), 55-87.

[51] See e.g. cc. 694-699; 1717-1720; *CCEO* cc. 497-500; 551-553; 1468-1470, 1486.

[52] On administrative justice in explicitly penal or disciplinary processes against religious in general see e.g.: cc. 1717-1720; *CCEO* cc. 1468-1470, 1486; ROSINSKI, Due Process (*passim*); DANIEL, *The Art of Good Governance*, 135-178; Francis G. MORRISEY, "Dealing

Determining (and safeguarding) the parties' rights and obligations will be much less straightforward where the proposed administrative act is not explicitly coercive *per se* but may still have major consequences, either for the member or for the institute. In this case, where there is no "accused" and the rights at stake are likely to be much less obvious, hearing those affected will still be necessary but much more emphasis will fall on the instruction phase. In order to act justly, the superior will have to first identify the interests of the institute in the decision and then ascertain the members or others whose interests are likely to be harmed by it.

It is well established that members of religious institutes, precisely because they have (by their vow of poverty) made themselves dependent on their institute, enjoy a right to adequate support from it—including the rights to systematic formation, stable community, the necessities of life and the acquired right to live religious life itself (cc. 654; 670).[53] These rights are clearly terminated by dismissal or exclusion from vows. They may, however, be affected by lesser administrative acts, for example, where a superior is faced with decisions relating to the care of an elderly or infirm member or where a move might deprive a member of community life. In the instruction of personal matters, c. 220, which safeguards privacy, will be particularly important.

Issues of administrative justice may even arise where the act under consideration is a *licentia* or a provision, such as the grant of a faculty or the appointment of a new local superior. For example, in appointing a person to the position of novice instructor (a provision), a superior will be responsible for ensuring that the appointee has the ability, spiritual gifts and preparation for the role.[54] By the same token, the rights of the novices to a proper

Justly with Complaints against Church Personnel," in *Canon Law Society Newsletter*, 182 (2015), 73-95; Gregory INGELS, "Safeguarding Rights when Investigating Allegations of Misconduct of Clergy and Religious," in *Canon Law Society Newsletter*, 137 (2004), 45-64; Gordon READ, "The Safeguarding of Rights when Investigating Allegations of Misconduct by Clergy and Religious," in *Canon Law Society Newsletter,* 137 (2004), 65-68; DALY, "Precepts and their Application," 197-202; RENKEN, *The Penal Law of the Roman Catholic Church*, 410-418; Rose MCDERMOTT, *Consecrated Life: Cases, Commentary, Documents, Readings*, Alexandria, VA, Canon Law Society of America, 2006, 202-217. On the burden of proof and "moral certainty", see PIUS XII, address to the Sacred Roman Rota, 1 October 1942, in *AAS*, 34 (1942), 338-343, English translation in William H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota: 1939-2002*, Ottawa, Faculty of Canon Law, Saint Paul University, 2002, 17-22.

[53] Elizabeth MCDONOUGH, "The Protection of Rights in Religious Institutes," in *Jur*, 46 (1986), 168-177. (=MCDONOUGH, "The Protection of Rights in Religious Institutes)

[54] While the Codes say little beyond that the instructor must be prepared (c. 651 §3; *CCEO* cc. 458, 524) other sources make it clear what kind of candidate is deemed appropriate:

formation will need to be considered. The superior will have to examine the candidate's ability to form the novices in the institute while respecting the fine balance between gaining a sufficient understanding of the novices' spiritual life to assess their vocation and respecting their rights in the internal forum (especially to reputation and privacy, c. 220; *CCEO* c. 23).[55] As such (and as discussed above), the fact that the appointment, as a provision, has no *direct* coercive effect on anyone should not relieve the superior of their obligations under c. 50. A formal, judicial style of instruction is scarcely appropriate here (in contrast to a coercive case). Nevertheless, it is hard to see how the superior could properly judge the suitability of the person for the office or be satisfied that the rights of potential novices will not be harmed (c. 50) without at least first gathering some information on the proposed novice instructor (the instruction) and then speaking to the candidate and possibly others (the hearing) before evaluating the decision. The superior may reasonably conclude that, given the inability to identify prospective novices and their lack of awareness in any event of the institute or its charism, hearing them is not possible or desirable and the case therefore falls within the exemption to c. 50. Nevertheless, proceeding without input from someone able to opine on the candidate instructor's suitability would risk the very arbitrariness and poor decision-making which c. 50 is designed to avoid.

Non-disciplinary issues of administrative justice are, however, most likely to arise in the context of administrative decision-decrees. While such decrees are neither penal nor disciplinary, it would be facile to claim that they do not engage issues of administrative justice. Although not having the same judicial cast as a disciplinary proceeding, the superior's decision may well have effects on the member which are indistinguishable in practice from disciplinary or penal measures. An obvious example would be, in the case of a clerical religious institute, the decision not to propose a man for ordination to the priesthood. (The specific issue of profession of vows will be considered below.)

POPE JOHN PAUL II, Post-Synodal Apostolic Exhortation on Consecrated Life *Vita Consecrata*, 25 March 1996, in *AAS*, 88 (1996), 377-486, English Translation in *Origins*, 25 (1995-1996), 681-719, §66; CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, Directives on Formation in Religious Institutes, 2 February 1990, in *AAS*, 82 (1990), 473-552, English translation in *Origins*, 19 (1990), 677-699, §§30 and 31; Elizabeth MCDONOUGH, "Role of the Novice Director," in *Review for Religious*, 59 (2000), 542-546. The requirements of the proper law of the institute in this regard will naturally also be vital.

[55] Canon 652; *CCEO* cc. 459, 525; Elizabeth MCDONOUGH, "Responsibilities of the Novice Director," in *Review for Religious*, 59 (2000), 650-655.

Because of the gravity of the potential consequences, in addition to proofs of both the harm and desirability of the action and hearing the affected person as required by c. 50, particular or universal law may effectively enlarge the instruction phase by requiring that certain specific facts be proven—and even enlarge the standard of proof. For example, c. 679 provides that an urgent cause must be shown by a bishop for excluding a member of a religious institute from his diocese.[56]

Aside from increasing the field of the instruction phase, the institute's particular law or universal canon law may require that the superior consult with one or more third parties before reaching a decision—occasionally for liceity only but often for validity. An example of the first case is c. 50 itself where, as we have seen, the superior must hear persons affected. Similarly, in the preliminary investigation of a delict, an Ordinary should hear experts in determining whether to proceed administratively, judicially or otherwise in relation thereto (c. 1718).[57] In these cases, failure to consult will not render the act invalid in itself but may give rise to a right of recourse.

The Codes, however, also provide for a specific class of situations where the *counsel* or *consent* of some other party or parties is needed for validity.[58] While this is a general norm, it is not (as Daniel notes) part of the general administrative procedure since it applies only in particular cases, i.e., when the law specifically states that consultation or consent is required to place an act.[59] Where such consultation or consent is required, the effect of c. 127 is that the act will be *invalid* without it. As Huels points out, the fact that the superior can *insist* on certain obligations when seeking advice from consultors under this canon (c. 127 §3; *CCEO* c. 934 §4) implies that it is directly applicable only when those consulted are persons subject to the superior's authority.[60]

A law may refer to counsel as when it says that a superior must "hear" (*audire*) certain persons, such as in deciding on the appointment of a lower superior (c. 625 §3) or excluding someone temporarily professed from further profession (c. 689 §1). In such cases, consultation, which may be done in any manner allowed by the institute's proper law, is compulsory for validity. Nevertheless, the views of those consulted do not bind the superior. That said, the advice, especially if unanimous, should be followed unless there is

[56] HUELS, "Administrative Acts and Activity in Canon Law," 75-76.
[57] Ibid., 72-73.
[58] Canon 127; *CCEO* c. 934.
[59] DANIEL, *The Art of Good Governance*, 125-126. As we have seen, c. 50 goes to liceity rather than validity.
[60] HUELS, "Administrative Acts and Activity in Canon Law," 72.

overriding cause to do otherwise.[61] On the other hand, where consent or "deliberative vote" (*suffragium* or *votum deliberativum*) is the term used, not only must the relevant persons or body be consulted, but they must also agree to the act for it to be valid. Such cases include decisions to grant extended leave of absence from the community (c. 665 §1), to transfer a member to another institute (c. 684 §1) or to expel a member from the house for grave scandal (c. 703).[62]

The consultation required may be with people acting as individuals—in which case *all* the relevant individuals must be consulted (however this is done) and, if that is what is required, give their consent (c. 127 §2; *CCEO* c. 934 §2). It may also be with a college or body, such as the Superior's Council, College of Consultors or similar entity. This is particularly relevant in religious life, where c. 627 (*CCEO* cc. 422; 527) mandates the establishment of a Council in accordance with particular law to advise superiors in the exercise of their office. Many of the examples given above require the consent of this Council. Where the consent or counsel of such a body is required, the act will only be valid if the college has first been convened in accordance with c. 166 (*CCEO* c. 948) or the entity's proper law and its advice sought in accordance with that canon.[63] The canon does not explicitly state (as it does in regard to individuals) that the superior can only decide against the decision recommended by the body in the event of overriding reasons. Nevertheless, this would seem implied by the context.[64]

In 1985, the Pontifical Council for the Authentic Interpretation of Canon Law issued an authentic interpretation that the superior is not a member of the body which he or she convenes under c. 127 and therefore cannot break a tie between a body's members.[65] Nevertheless, there is still some question as to whether, in certain religious institutes with different traditions of

[61] Canon 127; *CCEO* c. 934; HUELS, "Administrative Acts and Activity in Canon Law," 70-71; Gary NEVILLE, The Religious Superior's Council in the 1983 Code of Canon Law, JCD Thesis, St. Paul University, Ottawa, 1986, 133 (=NEVILLE, The Religious Superior's Council); Elias L AYUBAN, "Non-Collegial Acts in Religious Institutes: A Study of Canons 127 and 655 §1", in *PCF*, 7 (2005), 96-101. (=AYUBAN, "Non-Collegial Acts in Religious Institutes)

[62] Canon 127; *CCEO* c. 934; HUELS, "Administrative Acts and Activity in Canon Law," 70-71; NEVILLE, The Religious Superior's Council, 122-123; AYUBAN, "Non-Collegial Acts in Religious Institutes," 97.

[63] NEVILLE, The Religious Superior's Council, 133-135; AYUBAN, "Non-Collegial Acts in Religious Institutes," 101-104; HUELS, "Administrative Acts and Activity in Canon Law," 72.

[64] Myriam WIJLENS, "Juridic Acts," in *CLSA Comm2*, 182.

[65] PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF CANON LAW, reply 5 July 1985, in *AAS*, 77 (1985), 771, English Translation in *RR* 1986, 91.

governance, the position may be otherwise (as it is in many cases in the Eastern Churches).[66]

In very rare cases, however, the superior and council must act collegially in placing the act, in which case the superior *does* form part of the body. While proper law may prescribe other instances, the only case of this kind in the universal law is c. 699 §1 (*CCEO* cc. 500 §1; 562 §3) which provides that in deciding whether to dismiss a member for grave and proven cause, the Supreme Moderator and his or her Council are to weigh the evidence as a body and decide collegially on the dismissal by secret vote.[67] In such cases, the provisions of c. 119 (*CCEO* c. 924) on collegial decision-making will apply unless the institute's particular law provides otherwise. This canon requires that all members be summoned and that an absolute majority agree to the proposed action.

To allow for a frank consultation, it is important that the process be genuine, so the persons to be consulted must give their opinion freely and sincerely with a view to the welfare of the community. For this reason, the superior may insist on secrecy in the decision-making process, even by oath or penal precept – c. 127 §3; *CCEO* c. 934 §4.[68] In this regard, the Eastern Code expressly provides that the superior has a duty to provide all necessary information to the consulting body or persons. While the Latin Code does not contain an explicit right to information, it must surely be implied since failure to provide information which the consultees require to render a useful opinion would prevent them from providing the informed advice to the superior which the canon requires and thereby render the consultation process nugatory.[69]

By extension, ensuring that the process is fair and genuine applies to the superior's dealings with the subject as well as any consultors. If the superior ignores reasonable and good faith requests by the subject as to how to deal with the matter, this may also make the process illicit, at least.[70] This could happen, for example, where two processes were potentially applicable, one of which was more favourable to the member than the other (as might happen where a member seeks voluntary departure rather than expulsion).

[66] NEVILLE, The Religious Superior's Council, 147-156; 171-173; cf. *CCEO* c. 164.

[67] NEVILLE, The Religious Superior's Council, 135.

[68] Ibid., 137-138; HUELS, "Administrative Acts and Activity in Canon Law," 70.

[69] *CCEO* 934 §3; AYUBAN, "Non-Collegial Acts in Religious Institutes," 106.

[70] SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* PALAZZINI, 23 January 1988, prot. no. 15721/83 CA, reported in DANIEL, *Ministerium Iustitiae*, 203-230; DANIEL, *The Art of Good Governance*, 189.

3.2 — The Act Itself: Formalities, Delegation and Revocation

Once the preparation for the act is complete and the superior decides to proceed, the act itself will need to fulfill certain basic requirements for liceity. The first is that there actually *be* an act, at least where the law demands a decision or a request has properly been made. While it is perfectly legitimate that a decision be made not to proceed or a request be turned down, there must be an evaluation and a decision one way or the other: a failure to decide at all is unacceptable. Thus, in the absence of a specific provision to the contrary, if no decision on a request is made within three months (in the Latin Church) or sixty days (in the Eastern Churches), i.e. "administrative silence", the request is deemed to have been refused and recourse (discussed in ch. 3 below) can be made against that refusal. The superior negligently refusing to act may also be liable in damages for any harm flowing from his or her failure.[71]

Universal law does not mandate any particular form for a written act. It is traditional that the superior include the date and place of issue, background facts and procedural history, motivating reasons and the title of the issuer's authority, sign the enacting document and have a notary countersign it, but (subject to particular law) none of this is essential, at least within a religious institute.[72] Even something called only a "letter" may contain an administrative act which will accordingly be enforceable or open to recourse if it grants a favour or makes a decree, regardless of what form it takes. As a result, decision makers would be well advised to ensure that any document which can be construed as placing an act meets at least the minimum requirements of cc. 50 and 51.[73]

While the form of the act is not decisive, it will (subject to the limited enforceability accorded to oral precepts) have to be placed in writing (c. 37; *CCEO* c. 1514), at least if it is to be enforceable in the external forum. If the act is placed in commissorial form (i.e., requires a third party to verify

[71] Canon 57 §3; *CCEO* c. 1518; DANIEL, *The Art of Good Governance*, 158-167; MOODIE, "Singular Administrative Acts," 115.

[72] DANIEL, *The Art of Good Governance*, 169-170. That said, as Moodie points out, it would very difficult for an executor to be able to verify an act (as c. 40 requires) without a signature or other form of authentication: MOODIE, "Singular Administrative Acts," 102. Where the decision making of a diocesan curia is at issue (which could potentially be the case in relation to a religious institute of diocesan right), the formalities of c. 474, which include the signature of the Ordinary and the chancellor or notary, will need to be followed.

[73] SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* AUGUSTONI, 18 March 1995, prot. no. 24779/93 CA, reported in *L'attività della Santa Sede nel 1995*, Vatican City, LEV, 1996, 847; DANIEL, *The Art of Good Governance*, 190-193.

certain facts before executing the act), then the execution of the commission by the person receiving it (the carrying out of the act) will also have to be in writing.[74] It is unclear if "writing", in this context, includes electronic notification. As Moodie points out, there probably needs to be a written original although, if an executor has received an electronic copy from the one placing the act, he or she will be able to treat that copy as previous notice for the purposes of c. 40 (*CCEO* c. 1521) and so execute the act without waiting for the original document.[75]

In considering the position of executors (third parties who carry out the decision), it is important to distinguish a number of situations. Universal or particular law allows (and sometimes requires) that administrative acts be delegated by a superior in accordance with the universal law or the proper law of the institute. This provision is both necessary and desirable given the varied structures and charisms of religious institutes.[76] A delegation may involve the delegation (or sub-delegation) of *executive power* (i.e., the power to grant favours and/or to take decisions and act upon them) in terms of cc. 137-142. Alternatively, it may be a delegation merely of the *execution* of particular acts under cc. 40-47 and 54. Even here, though, the execution of an act is itself an act of executive power (as it brings the relevant act into force). An executor of an administrative act may be either voluntary or necessary. A *voluntary* executor has discretion as to whether or not to execute. A *necessary* executor's discretion, by contrast, is restricted to determining whether the situation envisaged by the act exists and acting on it if it does.[77]

In either situation, however, it is important to remember that the delegation itself is an administrative act in its own right (a provision), and the law relating to these acts applies. The delegation itself will therefore have to be duly considered and reduced to writing. By virtue of cc. 61 and 62, it need not necessarily be communicated or accepted to be effective, a delegation which is potentially knowable on enquiry is valid. By contrast, a delegation which cannot be known at all by the delegate will *ipso facto* be ineffective, because a completely unknowable act cannot be acted on.[78]

[74] Canon 37; *CCEO* 1514; MOODIE, "Singular Administrative Acts," 102-103.

[75] MOODIE, "Singular Administrative Acts," 103. Curial praxis and custom would naturally also be relevant in determining the status of an electronic communication.

[76] Canon 638; Kelly CONNORS, The Role of the Major Superior with Particular Reference to Apostolic Women's Religious Institutes in the United States, JCD Thesis, St. Paul University, Ottawa, 2011, 232-238.

[77] Canons 40-42, 70; MOODIE, "Singular Administrative Acts," 105-106, 121.

[78] HUELS, "The Efficacy of Delegation without Notification or Acceptance," 69-108.

At least where the act is a decision, the written document will, as we have seen when discussing the general administrative procedure, need to include the reasons for the decision. As discussed, there seems good reason for applying this to precepts also. The requirement for reasons is both in order to avert unnecessary recourse and in order to protect the rights of the affected person(s). While the reasons need only be given in summary, they must at least show that the decision made bears some relation to the information gathered in the information and hearing stages in order to provide a concrete basis for understanding the superior's choices.[79] This would also seem to imply that where special administrative procedures require particular facts be proven (for example that the infirmity of a religious makes him or her unfit to live the life of the institute—as in c. 689 §2 discussed below), the proof of these facts will need to be specifically addressed in the reasons for the decree.

The act will also need to be communicated to those affected. Unlike the safeguards in cc. 50 and 51, this is not a question of liceity but of validity—an uncommunicated act, like an unpromulgated law, has no independent existence since one cannot be bound to an obligation which one cannot know.[80] (The one apparent exception, as we have already seen, is provided by cc. 61 and 62 in the case of rescripts. This situation can be distinguished, though, since favours and faculties do not necessarily require action by a recipient.) As noted above, communication is usually by handing over a copy of the act to the person(s) affected although, in rare circumstances, communication may occur by reading the act to the person or even be deemed where the person affected absolutely refuses to cooperate in receiving it (a refusal which, of its nature, implies that the would-be addressee *does* have knowledge of the act, at least in outline). Similarly, revocation of an act, itself an administrative act, must be by the issuing authority or by his or her superior or successor. Without exception (including in the case of rescripts or *licentiae*), such revocation takes effect only upon its notification to the original recipient of the act (c. 47; *CCEO* c. 1513 §3).

3.3 — Example 1: Exclusion from Perpetual Profession

Here we use the principles set out above to consider exclusion from permanent vows. Applying the principles above, this is a coercive decree—more particularly, a *decision*. It should be noted at the outset that this is not a

[79] DANIEL, *The Art of Good Governance*, 170-173; MIRAS, "Title IV: Singular Administrative Acts", 534; MOODIE, "Singular Administrative Acts," 111.

[80] MIRAS, "Title IV: Singular Administrative Acts", 545-547; DANIEL, *The Art of Good Governance*, 173-175; DALY, "Precepts and their Application", 189.

dismissal *per se* (an explicitly disciplinary procedure). (The norms for actively dismissing a member in temporary vows are the same as for dismissal of a permanent member in the Latin Church while specific procedures exist for such dismissals in the Eastern Churches.)[81] The Codes permit refusal of vows by a competent major superior for just cause, including where a member is revealed, after temporary admission, to suffer from an illness or other disability – c. 689 §1 and §2; *CCEO* c. 547 §1 and §2. Aside from the specific case of infirmity or disability noted in §2, the canons do not specify what constitutes a "just cause". Javier Gonzales suggests that it should be linked to the qualities which justify entry into the institute in the first place under c. 642, namely, maturity of the candidate and suitability for the specific life of the institute.[82] This seems reasonable—if the criterion for refusing permanent incorporation in the institute is justice, then there must be some linkage between that criterion and the criteria for entry, given that (as we have already seen) members have an acquired right, once admitted, to remain in the institute in accordance with its particular law and to receive adequate support from it.

Seen in this light, the exception to the permitted exclusion in §2, where the illness rendering the member unsuitable for life in the institute was contracted through the institute's negligence or through work performed in it, is also understandable—there would be no justice in allowing an institute to exclude a member from taking vows where his or her unsuitability has resulted from the institute's own conduct, for example by putting the member in harm's way or where the institute accepted the member knowing of a pre-existent infirmity and its effects. (Despite §2, §3 provides that insanity alone, even if it prevents taking of further vows, is not in itself, cause for dismissal.)

Even though the act itself is not an exclusion from the institute, it does touch the member's status within it and leads to exclusion as a matter of practice once the member's temporary vows expire. It is therefore deemed an exclusion for the purposes of c. 690 (which governs re-admission).[83]

[81] *CCEO* cc. 499; 552; c. 696. In the Latin Church, however, the onus of proof and the serious of the required conduct are somewhat relaxed for dismissal of the temporarily professed – Jobe ABBASS, *The Consecrated Life: A Comparative Commentary of the Eastern and Latin Codes*, Ottawa, Faculty of Canon Law, St Paul University, 2008, 413. (=ABBASS, *The Consecrated Life*)

[82] Javier GONZALES, "Legitimate Departure from a Religious Institute," in *Boletín Eclesiástico de Filipinas*, 78 (2002), 696.

[83] Elizabeth MCDONOUGH, "Exclusion from Profession at the Expiration of Temporary Profession," in *Review for Religious,* 60 (2001), 544, 546. On the origin of the norms on voluntary and non-disciplinary departure from an institute see Jobe ABBASS, "Departure from Religious Institutes in the Latin and Eastern Catholic Churches," in *StC*, 32 (1998), 97-128; ABBASS, *The Consecrated Life*, 400-401.

While the issue will inevitably arise no later than when the member applies for final vows, it is quite possible that consideration of the matter may be forced earlier due to the member's conduct or illness. Barring a person from final profession in these circumstances sends the message that they no longer have a future in the institute and that failure to leave voluntarily is, effectively, "wasting time" (although it may also raise questions about the robustness of the institute's formation process which has allowed the member to proceed as far as he or she has).[84] As such, while it is clearly neither a dismissal nor penal in nature and therefore lacks many of the safeguards associated with such procedures, it has an analogous effect to a penal sanction and may well be read equivalently by any potential future employer of the newly secularised religious. A religious barred by infirmity from taking vows and having possibly forfeited individual property, is particularly vulnerable—losing the support of the institute while possibly, depending on the nature and gravity of the problem, being completely unable to reconstruct a life outside it. Notwithstanding the consequences, as McDermott points out, resort to this procedure may nevertheless be entirely appropriate as a timely way of ensuring that unsuitable candidates are not promoted to permanent vows (dismissal from which would require the much more formal and complex dismissal process provided in cc. 696-700—as well as the intervention of both the Supreme Moderator and the Holy See).[85] Indeed, while the consequences for the member are undoubtedly severe, this decision is qualitatively very different to a formal dismissal (which *is* effectively a particular form of penal process). Jacinta Opondo points out that there are three reasons why the legislator rightly makes admission to final vows (or its refusal) fundamentally a matter of discretion on the part of the superior. Such admission is, firstly, a matter of discerning the genuineness of a particular individual vocation in conscience. Secondly, it concerns the governance of the religious institute (and the full freedom to admit a member or not which is inherent in the concept of temporary profession). Finally, it involves the determination (on a case by case basis) of whether exclusion is a proportionate response to the issues raised by the member's conduct or infirmity.[86]

All of this means that, while exclusion from permanent vows may be reasonable and even necessary in some cases, the seriousness of the consequences means that the relevant major superior will have to take particular

[84] McDermott, *Consecrated Life*, 189.

[85] Ibid.

[86] Jacinta A. Opondo, *Temporary Profession and Exclusion from Subsequent Profession (Cann. 655; 689): Theological-Juridical Study*, Rome, Editrice Pontificia Università Gregoriana, 2017, 275-276. (=Opondo, *Temporary Profession*)

care to ensure that the administrative activity leading up to the decision is fair. With this in mind, the Codes mandate two particular processes which are potentially engaged prior to exclusion from permanent vows (accordingly making this a special administrative procedure).

The first is that, in the case of the member barred by infirmity, more than one expert must testify both as to the member's illness and to the fact that it renders him or her unsuitable for life in the institute. This certification, and proof that the infirmity was not contracted as a result of the institute's negligence or work performed therein, are required for the validity of the exclusion from vows.[87] By implication, therefore, not only will the experts need to be both unbiased and medically competent but the superior will need to ensure that they are aware, if they are not also members of the institute, of the demands of life in the institute in order to be able to give the required opinion.[88] In addition, the superior will also need to ascertain that the injury or infirmity has not been incurred in the course of work for the institute or through its negligence.

Even if the grounds for exclusion have been made out under one or other head, exclusion from vows is not mandatory. Accordingly, in making the decision, whether on the basis of the member's infirmity or not, the Codes mandate a second special procedure for validity—the consultation process in c. 127/*CCEO* c. 934 discussed above. Having concluded that the threshold requirements for exclusion have been met (whether the just cause is based in the member's infirmity or on some other ground), the superior will, in addition to any expert advice under c. 689 §2, need the advice of his or her council. As we have already seen, the duty which the superior has under c. 689 §1 is a duty to *hear* the council. He or she may not validly proceed without advice but may act against it (although should override a unanimous recommendation only for compelling reasons). In addition to these two special procedures, however, the general administrative procedures in cc. 50 and 51 will also apply.

Applying these principles, a sound process would therefore run as follows. Once the superior decides to proceed, he or she must first gather the relevant information including the mandated expert reports (the *instruction*) and then (pursuant to c. 50) inform the member of the broad outline of the grounds upon which the superior proposes to act and give them the opportunity to address

[87] Canon 689 §2; *CCEO* c. 547 §2; Elizabeth McDonough, "Exclusion from Profession at the Expiration of Temporary Profession," in *Review for Religious,* 60 (2001), 546. (=McDonough, "Exclusion from Profession")

[88] Implied by c. 1574 / *CCEO* c. 1255 on qualifications of an expert – McDonough, "Exclusion from Profession," 547.

the issues raised (the *hearing*).[89] While c. 689 is silent about the timing of the superior's discussions with the council, it would seem to be most appropriate to seek the council's advice during the *evaluation*, i.e. *after* the affected member has been heard but before making the decision. This will ensure that all relevant facts (including all information the member adduces) are laid before the superior's council (except to the extent that any information is truly confidential). It is, of course, easy to imagine circumstances where the proviso to c. 50 will apply because a hearing will not be possible. One example might be if the dismissal is based on infirmity and the person concerned is in a coma. That said, even though canon law may not require it, failure to grant a proper hearing to the member (alone or through representatives in the case of incapacity, for example) may expose the institute to liability at civil law for breach of administrative procedures and/or human rights.[90]

In rendering the *decision*, the superior will have to follow c. 51 in order to bind the subject in the external forum. The decision will therefore need to be in writing, be communicated to the subject and state the reasons on which it is based. This will apply even (indeed, especially) if the actual communication of the decision has been oral and in the presence of witnesses in accordance with c. 56 (and a clear written record will, in any event, serve to protect the institute against any subsequent allegations of arbitrary decision-making).[91] Since, as we have seen, these reasons will need to provide an adequate rational basis for the superior's choices, they should include at least the "just cause" for the dismissal and, if the decision is based on the subject's infirmity, the link (if any) between the infirmity and the institute. Hence, they should include at least a summary of, first, the experts' conclusions as to the illness and its effect on the member's suitability for vows and, secondly, of the superior's decision as to whether the infirmity predated the member's entry into the institute and/or results from the negligence of the institute or work performed therein.

Finally, while the member has no right to compensation for work done in the institute, some form of equitable compensation and, where necessary, follow up support will need to be granted, especially if infirmity is the cause of dismissal (c. 702). Any such provisions should also be included in the decision in order to

[89] The decision to proceed may, of course, be triggered by the member's own application to take vows – McDonough, "Exclusion from Profession at the Expiration of Temporary Profession," 546.

[90] A recent example of civil action to enforce the right to a hearing in case of exclusion from permanent profession is Court of Appeal of Lesotho, *Sephamola & Ors v Ponya,* C of A (CIV) 2/2013, 19 April 2013, https://www.lesotholii.org/files/ls/judgment/court-appeal/2013/7/april_2013_fr_joseph_sephamola_ors_vs_bro_t_pony_16686.pdf (23 July 2017).

[91] Opondo, *Temporary Profession*, 280-281.

avoid later uncertainty and potential litigation.[92] In addition, given that, as discussed above, the right of defence also includes the right of appeal, the member should also be informed in the decision about their rights to challenge the superior's decision. These will be considered in more detail in the next chapter.

3.4 — Example 2: Reassignment

Reassignment is a diverse phenomenon—it may or may not include canonical transfer from one fixed office to another and, depending on the circumstances, could take the form of any specific administrative act. It could be a favour (a sabbatical, for example), a provision (such as a new role), a precept or a decision (for example, in response to a member's disruptive conduct). In the worst case scenario, it could even be mandated from outside by the diocesan Bishop as an extreme resort.[93] The consequences are also generally much less severe for the member than in the previous case since membership in the institute itself is not in doubt. Indeed, some religious institutes (such as the Society of Jesus) have ongoing disponibility for ministry as an explicit part of their charism.[94] In addition, the vow of obedience will severely constrain the subject's ability to resist any proposed transfer.[95] Nevertheless, the results of reassignment may be significant, for example, where a superior proposes to send a person to work in a place which may exacerbate an existing medical condition or may deprive them of a meaningful community life in the institute.

As with exclusion from final profession, proper law (such as the institute's constitution) is likely to be crucial in determining both the member's specific rights and the procedure to be used. Nevertheless, the broad principles of administrative law decision-making which we have considered above will apply. If what is at issue is a favour or provision, there are unlikely to be any difficulties. Even here, however, the logic of c. 51 applies, and the nature and terms of the assignment should be reduced to writing for the certainty of all parties.

[92] In addition to all the above, particular law—most obviously the institute's constitution, may set further requirements which will need to be followed in relation to either the exclusion procedure or subsequent issues.

[93] Canon 679; Rose McDERMOTT, "Ecclesiastical Authority and Religious Autonomy: Canon 679 Under Glass," in COGAN (ed.), *Sacerdotes Iuris (Digesta 1.1): Miscellanea in Honour of William H. Woestman, O.M.I./Mélanges en l'honneur de William H. Woestman, O.M.I.*, Ottawa, Faculty of Canon Law, St Paul University, 2005, 235-254.

[94] See e.g. John W. PADBERG (gen. ed.), *The Constitutions of the Society of Jesus and their Complementary Norms: A Complete English Translation of the Official Latin Texts*, St Louis Mo, Institute of Jesuit Sources, 1996, arts 603-617; complementary norms 252-254.

[95] McDONOUGH, "The Protection of Rights in Religious Institutes," 176-181.

More issues will arise, however, in a case where the reassignment is to take place against the will of the person being moved. Here, the religious' rights to those things necessary for religious life (generally seen as including at least physical subsistence, community life, proper formation and participation in the institute's apostolate and the means of performing religious obligations) as well as to a good name and privacy may all be restricted by a move.[96] Accordingly, any law (including proper or particular law) restricting these rights will need to be interpreted strictly.[97]

That said, the move may well be necessitated by the conduct of the member which interferes with other members' rights. One of the superior's most important tasks during the *instruction*, therefore, will be to consider exactly whose rights (as well as those of the member to be moved) will be affected. These may include members of both the current and proposed communities. During the *hearing*, all of these will be "those whose rights could be harmed" within the definition of c. 50 and should therefore be consulted insofar as practical and given a genuine chance to express a viewpoint. The *evaluation* should take all these interests into consideration. Again, especially in the case of a coerced reassignment, the *decision* itself will have to be in writing and state its reasons—at least in outline. As noted above, an act of reassignment taking the form of a precept (at least if it is not penal) does not have to be in writing for validity. That said, the severe restrictions on the enforceability of an oral precept mean that the superior would be well advised to reduce it to writing if he or she wishes to avoid difficulties, especially for any successor who may have to deal with the matter. Likewise, the act of reassignment will need to be communicated to the recipient in some fashion in order to be effective and should also set out any rights to challenge the decision (in order to avoid any later allegation by an affected party that their right of defence has been compromised).

3.5 — Summary

This section sought to apply the principles in section two to the practicalities of governance. We saw, with reference to two practical examples, that the process by which the superior reaches the decision to place an administrative act is critically important in the interests of justice. While in penal

[96] See e.g. cc. 608, 610, 611, 220, McDonough, "The Protection of Rights in Religious Institutes," 185-194.

[97] Canon 18; *CCEO* c. 1500. Potentially applicable laws include the particular law of the institute (especially regarding superiors, see e.g. c. 624) and, in relation to transfer from one stable office to another, c. 190 (which requires a "grave reason" for any transfer).

and disciplinary matters, the hearing of the matter and a proper right of defence will be particularly important (and usually regulated by law), the superior will need to pay special attention to the instruction phase in *all* cases in order to ensure that the act is appropriate and that the member's rights are both understood and respected. In many cases, special procedures (such as seeking medical advice) will be legally required. Consultation, especially with the council, will be needed before taking many decisions—especially where the status of the member within the institute is concerned. The decision will have to be written, reasoned and properly communicated.

4 — *Remedies*

Having considered the nature and types of administrative action, their place in religious institutes and the manner of their application including in specific cases, this section will begin with a brief outline of the ways in which an aggrieved subject might challenge the decision, once made. Finally, it will conclude with an overview of issues worthy of further exploration in this area.

As mentioned above, the right of appeal is generally regarded as integral to the right of defence. Recourse lies under both Latin and Eastern Codes even in the case of "administrative silence". Unfortunately, while both Codes set out detailed appeal procedures and court structures in respect of judicial decisions, the same is not true where administrative decisions are concerned.

Canon 1400 §2 provides that disputes relating to the exercise of administrative power may be brought only to the superior or to an "administrative tribunal". This reflects the fact that a system of administrative tribunals was initially approved by the drafters of the Code but removed near the end of the drafting process on the apparent grounds that it would fit uneasily within existing Church structures and potentially compromise bishops' authority. The Apostolic Signatura is now the only administrative tribunal existing under the Latin Code.[98] The *CCEO* equivalent of c. 1400, c. 1055, notably omits any reference to tribunals.

[98] Thomas J. PAPROCKI, "Part V: The Method of Proceeding in Administrative Recourse and in the Removal and Transfer of Pastors [cc. 1732-1752]" in *CLSA Comm2*, 1824-1826; John C. MESZAROS, "Procedures of Administrative Recourse," in *Jur*, 46 (1986), 107-141; Kevin MATTHEWS, "The Development and Future of the Administrative Tribunal," in *StC*, 18 (1984), 3-233.

The result of all of this is that the only explicit avenue for redress available in universal law to an aggrieved member of a religious institute is now what is known as hierarchical recourse, governed by cc. 1732-1739 (*CCEO* cc. 996-1004), a situation recognised as inadequate by the drafters of the Code themselves.[99] One exception to this rule is afforded by c. 125 §2 (*CCEO* c. 932 §2) which allows juridic acts of whatever kind, including administrative acts, to be rescinded by judicial action where they have been placed by virtue of *dolus* (deceit) or force or fear unjustly inflicted. Such acts can therefore be challenged according to the ordinary norms for trials. By their very nature, however, such cases are likely to be extremely rare. In addition, of course, the proper law of the relevant religious institute may allow for alternative dispute resolution processes or may give other alternatives for dispute resolution to persons or bodies within the institute itself.[100]

Recourse may be had against any singular administrative act in the external forum not made by an ecumenical council, the Roman Pontiff or the Apostolic Signatura – cc. 1732; 1629 §1; *CCEO* c. 996. As a result, all singular administrative acts in the external forum (regardless of whether the author is clerical or lay or whether they are favourable or not), lie within its purview, but general executory decrees or instructions do not.[101] While the acts of Roman dicasteries do not lie within the scope of hierarchical recourse, they may be the subject of contentious administrative recourse to the *sectio altera* (second section) of the Apostolic Signatura (sitting as administrative tribunal), governed by *Pastor bonus* and considered briefly below.[102]

Before commencing formal recourse, the petitioner and the superior must see whether their difference can be reconciled (c. 1733). There is no formal time limit for such reconciliation, although settlement measures do not

[99] Michael R. MOODIE, "Defense of Rights: Developing New Procedural Norms," in *Jur*, 47 (1987), 430.

[100] On these possibilities, and on the principles which should govern the reviewing superior's decision-making in the light of the Apostolic Signatura's jurisprudence, see OPONDO, *Temporary Profession*, 333-353.

[101] While the remaining canons refer to decrees, this canon makes it clear that all acts are open to recourse. Jorge MIRAS, "Part V, Section 1: Recourse Against Administrative Decrees," in *Exegetical Comm.*, 2052-2055 (=MIRAS, "Recourse Against Administrative Decrees"); John BEAL, "Hierarchical Recourse: Procedures at the Local Level," in *CLSAP*, 62 (2000), 94-97. (=BEAL, "Hierarchical Recourse")

[102] MIRAS, "Recourse Against Administrative Decrees," 2055; POPE JOHN PAUL II, Apostolic Constitution on the Roman Curia *Pastor bonus*, in *AAS*, 80 (1988), 841-930, English translation in *CCLA2*, 1423-1551, art. 123 (=POPE JOHN PAUL II, *Pastor bonus*); John PUNDERSON, "Hierarchical Recourse to the Holy See: Theory and Practice," in *CLSAP*, 62 (2000), 39-41. (=PUNDERSON, "Hierarchical Recourse to the Holy See)

prevent or delay the running of time on the recourse process itself—the assumption is therefore that attempts to resolve the grievance move in parallel to the recourse process. Reconciliation is likely to be more workable in some situations than others. (Clearly, this provision is intended to avoid frivolous or pointless recourse and not to suppress a genuine grievance; cf. c. 1446 which makes similar provision in relation to judicial action).[103] The canon also allows alternative dispute resolution mechanisms to be embodied in diocesan structures but does not make any equivalent provision for religious institutes.[104]

Prior to taking recourse, the aggrieved party must, within ten useful days of the impugned decision, petition the superior in writing (no particular form is required) to withdraw or amend the decision or, failing such a petition, lose the right to recourse. This petition (*supplicatio*) is, however, not required in three cases: where the recourse lies to a diocesan bishop against a decision of a subject of his (e.g. in the case of a decision within a religious institute of diocesan right), where the decision is against a decision deciding hierarchical recourse or where recourse lies by virtue of the superior's "administrative silence" (i.e. failure to respond to a request) – c. 1734 §3, *CCEO* c. 999 §2. If the superior accepts a late petition, then it may revive despite the lapse of the *fatalia*.[105] If the superior issues a new decree amending the act or rejects the *supplicatio* within thirty days of receiving it, then the time limit for beginning recourse starts with the issue of the new decree. If not, it runs from the thirtieth day (c. 1735).

CIC c. 1736 deals with the various options for suspending the act during the recourse process. Commencing the recourse process does not itself suspend an act's operation except in particularly serious cases (such as the dismissal of a member of a religious institute in accordance with c. 700) – c. 1736 §1. In other cases, the superior *may* (but need not) decide to suspend it for serious reasons and provided that there is no peril to the salvation of souls – c. 1736 §2. The person to whom recourse is made against the decision must revisit a decision on suspension – c. 1736 §3. Any suspension lapses in any event if the recourse is not pursued – c. 1736 §4.[106] It must be remembered that an act validly placed with respect to its external elements is presumptively valid – c. 124 §2; *CCEO* c. 931 §2.

[103] MIRAS, "Recourse Against Administrative Decrees", 2056-2063.

[104] These structures have, it seems, been very successful in the United States, but less so elsewhere: Kurt MARTENS, "Protection of Rights: Experiences with Hierarchical Recourse and Possibilities for the Future," in *Jur*, 69 (2009), 689-702.

[105] MIRAS, "Recourse Against Administrative Decrees", 2066.

[106] Ibid., 2074-2076; *CLSGBI Comm.*, 963-964.

The core provision relating to hierarchical recourse itself is *CIC* c. 1737 (*CCEO* cc. 997 §1; 1001). This provides that a person who considers him or herself to have been wronged by a superior's action must make recourse to that person's immediate superior within fifteen useful days of the expiry of the time limits under cc. 1734 and 1735 (considered above). While this closely parallels the wording of c. 50, in that the party must be able to show some actual or threatened injury,[107] there is no equivalent proviso allowing a superior to prevent an application for recourse (although recourse may, as noted below, be denied).

The Codes do not prescribe a specific procedure for recourse and much (including the determination of who exactly the immediate superior is) will therefore depend on the religious institute's proper law. That said, the person having recourse is specifically granted a right to a procurator, although futile delays are to be avoided and the person him or herself must answer questions as required (c. 1738, *CCEO* c. 1003). The possible options of the superior in relation to the decision under recourse are described in the broadest possible terms. He or she not only has the choice to confirm the decision or declare it null but also, as is deemed expedient, to amend it or to substitute a new decision for it, whether such decision is consistent with the challenged decision or contrary to it (*emendare, subrogare vel obrogare*) – c. 1739. (*CCEO*, cc. 1004-1006 restricts these options somewhat in recognition of potential limits imposed by the laws of particular Churches *sui iuris*.) Such broad discretion would include the option to provide for, or make modifications to, a decision relating to compensation of damages—an option expressly canvassed in *CCEO* c. 1005.[108]

Of course, the decision of the superior to whom recourse is made will also be an administrative act (a decree-decision, as considered above). Hence, it will also, in addition to any specific demands of particular law such as a religious institute's constitutions, need to comply with all the basic procedures for administrative acts (especially cc. 50 and 51). Equally, as canvassed above, administrative silence on the part of a superior to whom recourse is made (where it lasts for longer than three months in the Latin Church, or sixty days in the East) will itself be deemed a decision.[109]

The decision made on recourse will, like any other administrative decision, be subject to recourse in its own turn unless that superior is a Roman dicastery.[110] The result is that hierarchical recourse properly so called is exhausted

[107] BEAL, "Hierarchical Recourse," 97; MIRAS, "Recourse Against Administrative Decrees," 2082-2083.

[108] MIRAS, "Recourse Against Administrative Decrees," 2096-2097.

[109] BEAL, "Hierarchical Recourse," 105.

[110] BEAL, "Hierarchical Recourse," 103-105.

with the decision of the relevant dicastery. Given that we are considering the decisions of religious superiors in particular, this is most likely to be the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life.

If hierarchical recourse up to and including the relevant Vatican dicastery fails, the only remaining remedy open to an aggrieved party is contentious-administrative recourse before the Apostolic Signatura. This is no longer a recourse against the original superior's decision since the Signatura is not the hierarchical superior of the other dicasteries—all are equal in status.[111] Instead it is a new action against the dicastery which has finally dismissed or confirmed the original decision and is directed to the second section (*sectio altera*) of the Signatura in its capacity as administrative tribunal.[112] However, other affected parties (such as the religious superior whose decision has been confirmed by the dicastery and is now being challenged) will also need to be joined as respondents.[113]

Pastor bonus has clarified that the second section's jurisdiction concerns "singular administrative acts" issued or approved by dicasteries within the Curia.[114] In contrast to the case in hierarchical recourse, it is not open to the Signatura to reopen the merits of the impugned decision as such—the fact that a different decision could or should have been made is not sufficient by itself. Instead the issue is whether there has been error *in procedendo* (whether the decision is procedurally illegitimate) or *in decernendo* (whether the decision was unfounded or misapplied the law to the facts—i.e., where a properly instructed decision maker could not legally have reached the decision made).[115] The Signatura may award damages where loss has been incurred.[116]

[111] POPE JOHN PAUL II, *Pastor bonus*, art. 2 §2.

[112] POPE BENEDICT XVI, *Litterae Apostolicae motu proprio datae quibus Supremi Tribunalis Signaturae Apostolicae lex propria promulgatur*, 21 June 2008, in *AAS*, 100 (2008), 513-538, English translation The Proper Law of the Apostolic Signatura, in *Jur*, 75 (2015), 619-657, art. 34 §1 (=POPE BENEDICT XVI, The Proper Law of the Apostolic Signatura); DANIEL, *Ministerium Iustitiae*, 3-4; PUNDERSON, "Hierarchical Recourse to the Holy See," 39-43.

[113] Kenneth K SCHWANGER, "Contentious-Administrative Recourse before the Supreme Tribunal of the Apostolic Signatura," in *Jur*, 58 (1998), 185. (=SCHWANGER, "Contentious-Administrative Recourse")

[114] POPE JOHN PAUL II, *Pastor bonus*, art. 123. The wording in c. 1445 §2 ("acts of ecclesial administrative power") had caused some confusion – SCHWANGER, "Contentious-Administrative Recourse," 178.

[115] POPE BENEDICT XVI, The Proper Law of the Apostolic Signatura, art. 34 §1; PUNDERSON, "Hierarchical Recourse to the Holy See," 41; SCHWANGER, "Contentious-Administrative Recourse," 180.

[116] POPE JOHN PAUL II, *Pastor bonus*, art. 123 §2; POPE BENEDICT XVI, The Proper Law of the Apostolic Signatura, arts. 34 §2, 101; SCHWANGER, "Contentious-Administrative Recourse," 180-182.

An application for contentious-administrative recourse must be lodged within sixty useful days of the dicastery's decision (a time limit which can be waived only by the Pope).[117] It must be signed and dated, attach copies of the act (if possible) and a procurator's mandate (or a request for free representation) and specify the claimant, the claim, the details and date of the challenged act (i.e., of the dicastery) and the basis of the challenge.[118]

The Signatura's Secretary receives the recourse, communicates it to all other parties and orders the dicastery to communicate the challenged act within thirty days.[119] Thereafter, the parties' advocates are informed and a deadline set for submissions with the Signatura's promoter of justice submitting a view on the truth of the matter (*votum pro rei veritate*) once the parties have made their submissions. A similar procedure follows for any responses to this *votum*.[120] If the cardinal Prefect (the head of the Signatura), on the advice of the Signatura's principal officials (*Congresso*), believes that the complaint is not manifestly unfounded, he sends it to a full College of five judges—the decision either way must be delivered in writing (with reasons given for a rejection) and recourse against it may be made to the College.[121] The *Congresso* also decides (using a trial within a trial) whether or not to suspend an administrative act while the dispute is ongoing. There is no appeal against its decision (although the matter may be brought before the *Congresso* more than once).[122]

With regard to the substantive hearing of the case and subsequent steps, the College operates analogously to an appellate tribunal in a judicial setting (albeit that there are no appeal rights), with a formulation of the doubt (question to be decided), written and oral representations by the parties followed by deliberations in secret, a decision based on the verdicts of the majority and, finally, provisions as to execution of the decision (where appropriate).[123] No appeal lies against the Signatura's decisions—although this does not deprive a person of their general right to approach the Pope in relation to a matter (however remote the prospects of success might be in the circumstances).[124]

[117] POPE BENEDICT XVI, The Proper Law of the Apostolic Signatura, art. 74.
[118] Ibid., art. 73. Article 75 provides that a recourse will be null where the person or object is absolutely uncertain.
[119] Ibid., art. 79.
[120] Ibid., arts. 80-82.
[121] Ibid., arts. 83-84.
[122] Ibid., arts. 95-99.
[123] Ibid., arts. 85-94.
[124] SCHWANGER, "Contentious-Administrative Recourse," 195.

By way of conclusion to this brief overview of the remedies available for breach of the norms discussed in this article, some key points can be noted. The system of hierarchical recourse does provide limited redress for breaches of administrative justice in respect of members of religious institutes. There is, however, no independent oversight within the system itself, and it is not possible (short of an extraordinary petition to the Holy See) for a member to access protection outside it until all possible recourse options have been exhausted. Such external protection as there is (by way of contentious administrative recourse) is limited in scope (in that it only applies to errors *in procedendo* or *in decernendo*) and requires the expense of a proceeding in Rome with a procurator-advocate with right to appear before the Apostolic Signatura.

5 — *Conclusion*

This article has attempted to provide an overview of administrative decision making and related issues of justice for superiors in religious institutes. In particular, it has attempted to supply guidance to canonical advisors on the proper bases of, and formal requirements for, administrative action in the context of a religious institute and the avenues for redress open to a member who feels him or herself to be wronged by a superior's act. It has done so by considering the basic principles of just administrative action in religious institutes: the nature of the authority of superiors over their subjects, the nature and classification of administrative acts, their application to action in religious institutes—with specific, practical examples—and the remedies available for justice denied.

While it has not broken new ground, it has attempted to provide an accessible collation, assessment and overview of relevant administrative procedures and institutes in relation to religious life which could serve as something of a *vade mecum* for those advising superiors placing administrative acts. Further work in this area could include a detailed exploration of hierarchical recourse—especially in relation to disciplinary decisions, possibly coupled with a step by step analysis of disciplinary processes. An exploration of administrative decision making within diocesan structures could be an equally useful companion to this study dealing with religious institutes. Likewise, while the distinctions between the Latin and Eastern Codes have been touched on, these could be explored more fully—particularly in relation to individual processes in religious institutes governed by the Eastern Code.

It is to be hoped that this article (and others like it) may play some small part in making the relevant principles of canon law accessible to administrative decision makers and thereby improving the transparency and justice of administrative decision making within the Church.

Studia canonica 52 | 2018, 139-157
doi: 10.2143/STC.52.1.3285216

LES CENSEURS POUR LA PUBLICATION D'OUVRAGES ET LE RESPECT DES DROITS FONDAMENTAUX DES FIDÈLES (*C. 830* CIC)

DOMINIQUE LE TOURNEAU*

RÉSUMÉ — L'A. limite son propos au rôle du censeur ecclésiastique dans l'approbation des ouvrages que des fidèles souhaitent publier. Il expose, dans une première partie, les conditions de nomination des censeurs et les qualités que ceux-ci doivent remplir pour exercer leur charge dans un esprit de service. Cela implique, entre autres, une grande impartialité, en se limitant exclusivement à la conformité de l'écrit avec la foi et la morale catholiques, et en séparant nettement les remarques dont l'auteur doit nécessairement tenir compte des simples suggestions. Agir autrement porterait atteinte à de nombreux droits fondamentaux des fidèles et lèserait d'emblée le devoir fondamental de communion ecclésiale de la part du censeur lui-même. L'A. indique de façon précise un certain nombre de situations qui, pour cette raison, ne devraient pas exister dans l'exercice de la fonction de censeur. La deuxième partie traite des suites de l'avis favorable à l'octroi de l'*imprimatur* et des conséquences d'un avis défavorable à la publication d'un travail en matière de foi et de morale. Instaurer un climat de dialogue pourrait être une solution pour redonner confiance dans l'institution de l'*imprimatur*, dont l'utilité ne semble pas clairement perçue par certains censeurs.

SUMMARY — The A. limits his study to the role of the ecclesiastical censor in approving works which the faithful wish to publish. The first part deals with the conditions of the nominations of such censors and the qualities which they must fulfill in order to exercise their duty in a spirit of service. This implies, among other things, a great impartiality, whereby the censor is limited exclusively to the conformity of the writing with Catholic faith and morals and in separating clearly the remarks which the author must necessarily take into account from simple suggestions. To do otherwise would violate many of the fundamental rights of the faithful and would immediately undermine the fundamental obligation of ecclesial communion

* Professeur au *Studium* de droit canonique de Lyon. Juge au tribunal ecclésiastique de Lille.

on the part of the censor himself. The A. specifies a number of situations that, for this reason, should not exist in the exercise of the function of the censor. The second part deals with the consequences of the opinion favorable to the granting of the imprimatur and the consequences of an opinion unfavorable to the publication of a work on matters of faith and morals. Establishing a climate of dialogue could be a solution to restore confidence in the institution of the imprimatur, whose usefulness does not seem clearly perceived by some censors.

Introduction

Dans son ouvrage magistral sur *L'erreur et son juge*, l'académicien Bruno Neveu écrivait que « seule l'Église a qualité pour percevoir ce qui est nécessaire » dans le domaine de la foi catholique, « et un croyant ne saurait jouir de cette pénétration que d'une manière transitoire. Le discernement de l'Église a sur celui des fidèles une double supériorité : en extension parce qu'il s'étend à l'universalité du dépôt ; en fermeté parce qu'il ne peut s'appuyer sur aucun autre discernement et n'a d'autre règle que la vérité révélée »[1]. C'est une des raisons pour lesquelles l'Église demande que « les écrits touchant à la foi ou aux mœurs, que les fidèles se proposent de publier, soient soumis » au jugement des pasteurs sacrés, qui réprouveront « les écrits qui nuisent à la foi droite et aux bonnes mœurs » (c. 823 § 1 *CIC* ; cf. c. 652 § 2 *CCEO*). C'est aussi une raison déterminante pour que les fidèles obtempèrent à cette injonction. Historiquement, la censure des livres apparaît avec l'extension de l'imprimerie et les facilités qu'elle fournissait à la diffusion, non seulement de la vérité, mais aussi de doctrines erronées[2].

L'approbation et l'autorisation ecclésiastiques des publications concernant la foi ou la morale sont des dispositions prudentielles visant, non seulement à éviter la propagation de doctrines néfastes pour les fidèles, mais aussi à protéger l'auteur lui-même de toute déviation[3]. Ou, pour le dire autrement, « les normes canoniques constituent une garantie pour la liberté de tous : celle

1 B. NEVEU, *L'erreur et son juge. Remarques sur les censures doctrinales à l'époque moderne*, Naples, Bibliopolis, 1993, 725.

2 Sur l'aspect historique, on verra R. NAZ, *Traité de droit canonique*, Paris, Letouzey et Ané, 1948, t. III, 161-162.

3 « Les sanctions envers les théologiens fautifs font partie des mesures destinées à maintenir la discipline en matière de foi et de mœurs. L'autorité magistérielle compétente exerce un ministère délicat de confiance qui respecte les droits des personnes et qui protège la foi des fidèles » (A. KABAMBA NZWELA, *Le théologien catholique : vocation contemporaine du théologien catholique et protection de la communion de son Église*, Paris, Cerf, 2016).

des fidèles, qui ont le droit de recevoir le message de l'Évangile dans sa pureté et son intégralité aussi bien que celle des responsables pastoraux, des théologiens et de tous les publicistes catholiques, qui ont le droit de communiquer leur pensée, restant sauve l'intégrité de la foi et des mœurs et le respect envers les Pasteurs »[4]. Si le canon 1385 du code de 1917 interdisait absolument toute publication dans ces domaines sans autorisation ou permission préalable de l'autorité compétente, de nos jours la demande d'*imprimatur* ne semble pas être bien comprise et n'apparaît plus que comme une simple recommandation. Interrogé au moment de partir en retraite, le directeur d'un bureau de l'*imprimatur* constatait une diminution du nombre de demandes d'autorisation de publication : « En 2010, remarque-t-il, j'ai donné 42 *Imprimatur* et en ai refusé 2. En 2016, 30 ont été donnés et 2 refusés. Les cas de refus concernent des écrits que je ne peux « cautionner » au nom de l'Église », ajoutant que la plupart des *imprimatur* qu'il a accordés n'étaient pas nécessaires[5]. Toutefois la nécessité de l'*imprimatur*, et du *nihil obstat* qui le précède, ne provient pas du constat final d'absence d'inconvénients doctrinaux ou moraux. Ce serait prendre le problème à l'envers et amener les auteurs à décider eux-mêmes de l'orthodoxie de leur écrit. L'autorité ecclésiastique peut-elle s'en remettre ainsi au jugement de chacun ? Est-il concevable qu'un auteur, conscient de s'éloigner de la foi et de la morale catholiques, prenne le risque non hypothétique de se voir refuser l'*imprimatur* ? Ne serait-pas procéder à l'enterrement du service de l'*imprimatur* ? Comment juger a priori du caractère « nécessaire » de cet *imprimatur* ? Sa concession ne constitue-t-elle pas une garantie pour l'auteur, et accessoirement aussi pour l'éditeur, qui ne prend alors aucun risque doctrinal ?

Nous n'allons pas traiter ici de la question de la censure des livres dans son ensemble, mais nous limiter plus spécifiquement au rôle des censeurs. Il va sans dire qu'il nous faudra par moments élargir notre propos en débordant le cadre du seul canon relatif à la tâche des censeurs, à savoir le canon 830. Nous étudierons le fonctionnement de cette figure canonique en ayant sous les yeux les droits fondamentaux des fidèles. L'on sait que le catalogue des droits et des devoirs fondamentaux figurant dans les deux codes sont issus de la *Lex Ecclesiæ fundamentalis* et présentent de ce fait un caractère constitutionnel. Par suite, toute autre norme canonique doit être vécue et

[4] Congrégation pour la doctrine de la foi, Instruction sur certains aspects de l'utilisation des instruments de communication sociale dans la promotion de la foi, 30 mars 1992, dans *Comm*, 24 (1992), introduction ; texte français dans *DC*, 89 (1992), 729-733 (= CDF Instruction, 30 mars 1992).

[5] Cf. *Riposte Catholique*, 26 octobre 2017, www.riposte-catholique.fr/perepiscopus/mgr-patrick-chauvet-vicaire-episcopal-limprimatur (consulté le 30 octobre 2017).

interprétée en référence à ces droits et devoirs fondamentaux. Nous serons donc amenés à présenter d'abord la figure et le rôle des censeurs (I) avant d'indiquer les conséquences qui découlent de l'avis par eux formulé au terme de leur examen (II).

1 — *Les censeurs ecclésiastiques, qualités requises et exercice de la charge*

Le premier point à aborder et celui de l'existence des censeurs prévue par le droit canonique pour l'approbation de la publication d'ouvrages portant sur la foi ou les mœurs. Nous présenterons d'abord les qualités qu'ils doivent réunir (A), puis nous exposerons plus en détail la façon dont ils doivent procéder dans l'examen des documents soumis à leur jugement (B).

1.1 — La nomination des censeurs et leurs qualités

Il semble bien que la question des censeurs ecclésiastiques n'ait pas retenu particulièrement l'attention des canonistes, en dehors des encyclopédies et des dictionnaires de droit canonique[6]. Peut-être considèrent-ils qu'il s'agit d'un domaine pacifique. Est-ce si sûr ?

Le droit et le devoir des pasteurs de l'Église de préserver l'intégrité de la foi et des mœurs s'exercent dans le domaine des publications par le biais de censeurs approuvés par l'ordinaire du lieu ou par la conférence des évêques (c. 830 § 1 *CIC* ; c. 664 § 1 *CCEO*). Leur jugement favorable est qualifié de *nihil obstat*, et ouvre la voie à l'*imprimatur* de l'ordinaire du lieu. Comme toute intervention d'une autorité dans l'Église, la fonction de ces censeurs est de rendre service aux auteurs, afin qu'ils ne publient rien de contraire à la foi ou à la morale catholiques. Elle vise à défendre le droit du Peuple de Dieu à recevoir la foi dans sa pureté et son intégrité[7]. En effet, les actions qui porteraient atteinte à la foi ou aux mœurs « constitueraient des injustices envers l'Église et envers les autres fidèles, et même envers toute les personnes qui ont droit à la cohérence publique des catholiques »[8].

[6] Le dépouillement de *Canon Law Abstracts* depuis la publication du code de 1983 est éloquent à ce sujet.

[7] Cf. CONGRÉGATION POUR LA DOCTRINE DE LA FOI, Instruction *Donum veritatis* sur la vocation ecclésiale du théologien, 24 mai 1990, n° 37 (= CDF, Instruction *Donum veritatis*).

[8] Carlos J. ERRÁZURIZ M., *Corso fondamentale sul diritto nella Chiesa. II. I bene giuridici ecclesiali. La dichiarazione e la tutela dei diritti nella Chiesa. I rapporti tra la Chiesa e la società civile*, Milan, Giuffrè Editore, 2017, 123.

Malgré le terme utilisé, cette intervention de l'autorité ecclésiastique n'est nullement une censure au sens où on l'entend habituellement d'entrave à la liberté d'expression. Elle doit permettre aussi à l'évêque d'exercer son devoir de vigilance afin de, « si c'est le cas, de réprouver et de condamner les livres et les revues nocives pour la foi ou la morale »[9]. Nul n'y verra « une restriction indue à la liberté d'expression. Seuls les sots se prononceront pour l'affirmative »[10].

Aucune norme ne s'y opposant, le censeur peut être fort heureusement un laïc, homme ou femme, un clerc ou un membre de la vie consacrée[11]. Pour ce qui concerne les laïcs, nous trouvons ici une application concrète de la capacité que leur reconnait le canon 228 § 2 d'aider les pasteurs « comme experts ou conseillers, même dans les conseils selon le droit »[12].

Sous le régime du code de 1917, un office de censeurs devait exister dans toutes les curies épiscopales (cf. c. 1393 *CIC*/17), comme saint Pie X l'avait ordonné dans l'encyclique *Pascendi*, du 8 septembre 1907[13]. De nos jours, le censeur peut être choisi dans une liste de censeurs que la conférence des évêques a éventuellement dressée (c. 830 § 1 *CIC*). Ces censeurs sont de la sorte mis individuellement à la disposition des ordinaires désireux de recourir à leurs services. Il est sans doute opportun de faire figurer dans cette liste de censeurs le nom de personnes jouissant de compétences dans un large éventail de domaines, en Sainte Écriture, en théologie, en droit canonique, en spiritualité, en catéchèse, etc., pour réunir ainsi des compétences et des points de vue diversifiés afin d'offrir une gamme la plus large possible d'expertise et de connaissances et d'être ainsi en mesure d'assurer un travail de haute qualité, quel que soit le domaine faisant l'objet de l'écrit soumis à leur examen. Si ce travail devait reposer sur les épaules d'une seule personne, le risque en serait accru de décisions erronées, approximatives ou imprudentes, voire arbitraires.

[9] Congrégation pour les évêques, *Directoire pour le ministère pastoral des évêques « Apostolorum successores »*, n° 141.

[10] Alain Sériaux, *Droit canonique*, Paris, PUF, 1996, coll. « Droit fondamental », n° 164, 457.

[11] Contrairement aux dispositions antérieures qui réservaient cette charge aux seuls prêtres : cf. la note 13.

[12] Cf. D. Le Tourneau, *Droits et devoirs fondamentaux des fidèles et des laïcs dans l'Église*, Montréal, Wilson & Lafleur, 2012, n^os^ 244-246 (= Le Tourneau, *Droits et devoirs fondamentaux*).

[13] « Qu'il y ait donc dans toutes les curies épiscopales des censeurs d'office, chargés de l'examen des ouvrages à publier : ils seront choisis parmi les prêtres du clergé tant régulier que séculier, recommandables par leur âge, leur science, leur prudence, et qui, en matière de doctrine à approuver ou à blâmer, se tiennent dans le juste milieu » (St Pie X, enc. *Pascendi*, 8 septembre 1907, dans *Écrits doctrinaux*, Paris, Éditions Téqui, 1975, 235 [= *Écrits doctrinaux*]).

Nul ne peut prétendre de nos jours être spécialiste dans toutes les disciplines. Or, l'auteur d'un ouvrage, lui, peut, en principe, revendiquer ce qualificatif. Il a droit à la vérité, non à des imprécisions ou à des appréciations manquant de justesse. Nous verrons plus avant que des droits fondamentaux des fidèles sont en cause, et, par suite, qu'ils ne peuvent pas être traités à la légère.

La conférence des évêques peut tout aussi bien de son côté « constituer une commission de censeurs » (c. 830 § 1 *CIC*)[14], répondant aux qualités tout juste mentionnées, et que les ordinaires des lieux pourront consulter. Cette commission est supposée agir en tant que collège et suivre les normes du canon 127 § 1 (c. 934 § 1 *CCEO*), autrement l'on ne voit pas ce qui distinguerait la commission de la liste mentionnée par la même norme. En tout état de cause, la diversité d'expertise et de compétences des membres d'une telle commission « est vitale pour une prestation juste et équitable » du service attendu des censeurs et, au fond, de leur raison d'être[15].

Non parlons de « service », car tel est bien l'esprit dans lequel les censeurs sont invités à agir, conformément à la conception de l'autorité mise à l'honneur par le concile Vatican II et développée depuis : « Il faut, soulignait par exemple saint Jean-Paul II, comprendre et exercer le pouvoir dans l'Église selon les catégories du service, de manière que l'autorité ait l'aspect pastoral comme caractère principal »[16].

Enfin, et en troisième lieu, chaque ordinaire du lieu conserve « entier le droit […] de confier le jugement sur les livres à des personnes approuvées par lui » (c. 830 § 1 *CIC*). C'est un véritable droit de sa part. Il n'y a de fait aucun inconvénient à ce qu'il préfère s'adresser à des personnes fiables dont il connaît et a déjà eu l'occasion d'apprécier les compétences, même si elles appartiennent à une autre communauté hiérarchique que la sienne.

Ceci dit, les trois voies envisagées par le canon 830 *CIC* peuvent parfaitement exister de façon concomitante, compte tenu du fait que l'évêque diocésain n'aura sans doute pas toujours à sa disposition des experts dans toutes les matières doctrinales voulues. Il aura alors tout intérêt à s'adresser à la

[14] En droit oriental, il est prévu que cette « commission spéciale de censeurs » pourra être consultée par « le hiérarque du lieu, le synode des évêques de l'Église patriarcale ou le conseil des hiérarques » (c. 664 § 1).

[15] James A. CORIDEN, dans CLSA *Comm1*, 583.

[16] JEAN-PAUL II, const. ap. *Pastor bonus*, introduction, n° 2. Cf. V. GÓMEZ-IGLESIAS, « Acerca de la autoridad como servicio en la Iglesia », dans PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS (dir.), *Ius in vita et in missione Ecclesiæ*. Acta symposii internationalis iuris canonici ocurrente X aniversario promulgationis codicis iuris canonici diebus 19-24 aprilis 1993 in Civitate Vaticana celebrati, Cité du Vatican, Librairie Éditrice Vaticane, 1994, 193-218 (= *Ius in vita et in missione Ecclesiæ*).

conférence des évêques pour lui demander tel ou tel censeur afin de procéder à l'examen circonstancié de certains ouvrages plus délicats ou d'une portée plus large qu'un simple livre d'un théologien ou d'un spiritualiste. Non faisons allusion, entre autres, à l'approbation de catéchismes, approbation qui est bien du ressort de l'ordinaire du lieu (cf. c. 775 § 1 *CIC*; c. 827 § 1 *CIC*).

Mais si la responsabilité de ce service repose sur une seule personne dans un diocèse, ce censeur est immanquablement incompétent dans un nombre déterminé de domaines, dans lesquels il cesse *ipso facto* d'être « remarquable par la science » (c. 830 *CIC*) et n'est donc pas en mesure d'exercer correctement sa mission. S'il intervenait malgré tout, ce serait au détriment du respect des droits fondamentaux des fidèles concernés.

En outre, l'évêque conserve le droit de procéder personnellement à l'examen d'un ouvrage s'il le souhaite. Sans doute sera-t-il plus prudent qu'il s'en remette aux censeurs[17].

La nécessité de compter avec des censeurs s'impose du fait que la publication et la diffusion d'écrits est un des moyens de l'évangélisation, et qu'il est donc appréciable de compter avec un « label » officiel d'authenticité. Le concile Vatican II indiquait déjà que « tous les membres de l'Église uniront volontiers leurs efforts concertés, afin de mettre efficacement, sans aucun retard et avec le plus grand zèle les moyens de communication au service des multiples œuvres d'apostolat, compte tenu des exigences particulière de temps et de lieux. Ils auront à cœur de prévenir les initiatives mauvaises, surtout là où l'évolution morale et religieuse réclame leur intervention de manière plus urgente »[18].

Cependant la censure préalable reste une précaution nécessaire. Elle n'est pas sans lien avec le devoir fondamental, codifié pour les laïcs, mais qui s'impose de toute évidence à tous les fidèles, donc y compris aux théologiens, de « ne pas présenter dans des questions de libre opinion leur propre point de vue comme doctrine de l'Église » (c. 227 § 2 *CIC* ; c. 402 *CCEO*). La responsabilité des censeurs est grave, car, comme le soulignait saint Jean XXIII, bien des consciences s'en remettant au jugement de l'autorité ecclésiale. Cette mission « est de très haute valeur, car elle participe de la sollicitude maternelle de l'Église de guider et d'instruire ses propres enfants dans la connaissance de la vérité, et de les défendre de tout danger »[19].

[17] Cf. Bernard DAVID, « L'imprimatur est-il encore nécessaire ? » *Les Cahiers du droit ecclésial*, 2 (1985), 181.

[18] CONCILE VATICAN II, décret *Inter mirifica*, n° 13.

[19] JEAN XXIII, Discours aux participants au congrès des censeurs ecclésiastiques appartenant au clergé diocésain et au clergé religieux, 18 novembre 1959 : www.vatican.va/content/john-xxiii/it/speeches/1959/documents/hf_j-xxiii_spe_19591118_revisori.html (= JEAN XXIII, Discours, 18 novembre 1959).

C'est pourquoi il nous faut maintenant passer au crible la façon dont, une fois dûment nommé, le censeur doit mener à bien la tâche que l'ordinaire du lieu lui confie, en ayant à l'esprit que « les droits de chacun intéressent les droits des autres »[20].

1.2 — Les conditions dans lesquelles le censeur doit exercer sa fonction

Lorsqu'il est appelé à exercer sa fonction dans un cas concret, la norme précise que le censeur écartera « toute acception de personnes » et « aura seulement en vue la doctrine de l'Église sur la foi et les mœurs[21] telle qu'elle est présentée par le magistère ecclésiastique » (c. 830 § 2 *CIC* ; c. 664 § 2 *CCEO*). Il est donc fermement invité à accomplir sa tâche avec une impartialité absolue ; c'est-à-dire avec un entier détachement de l'appréciation qu'il peut porter personnellement sur l'auteur dont il doit étudier l'œuvre, de la sympathie ou de l'antipathie qu'il éprouverait pour lui, motivée peut-être par des écrits antérieurs du même auteur, ce qui en soi ne préjuge en rien de la qualité de ce nouvel ouvrage, ou pour l'école de pensée dont il se réclame. Il doit par suite faire totalement abstraction de ses goûts et de ses sentiments personnels. Le censeur est quelqu'un de neutre par principe : il ne peut être « juge et partie ». Il n'a donc pas à prendre de positions personnelles, ni à défendre de thèse propre, ni chercher à faire prévaloir ses propres vues, qui peuvent diverger légitimement de celles de l'auteur dont l'œuvre est portée à son évaluation. Il n'agit pas davantage en juge ecclésiastique, mais remplit un service. Certes il dispose du pouvoir de donner ou de refuser le *nihil obstat* qui conduira l'ordinaire à agir en conséquence. Mais il ne s'agit pas d'un pouvoir discrétionnaire, en ce sens qu'il ne saurait être arbitraire. La réponse du censeur doit être apportée en vérité, et fondée sur des données objectives. Le requérant s'en remet au fait que les censeurs réunissent les qualités précisées par le canon 830 : être « remarquables par leur science, la rectitude de leur doctrine et leur prudence »[22]. Et, comme tout un chacun, viser au premier chef le *salus animarum* (cf. c. 1752 *CIC*).

Comme la norme le précise, le censeur agit à partir de la doctrine officielle de l'Église catholique, indépendamment de la doctrine qu'il pourrait le cas échéant professer lui-même. Mais l'on est en droit de supposer que s'il

[20] Charles DE GAULLE, *Discours et messages*, Paris, Plon, 1975, t. I, 482.

[21] Contrairement au c. 1393 § 2 *CIC*/17, la norme ne mentionne pas « le consentement des docteurs approuvés ».

[22] Le code de 1917 mentionnait l'âge, l'érudition et la prudence, rendant apte à suivre une voie moyenne et sûre (cf. c. 1393 § 3 *CIC*/17).

a été choisi comme censeur, c'est que ses propres publications ou prises de position sont elles-mêmes intégralement en harmonie avec la doctrine présentée par le magistère ecclésiastique. Et qu'elles aient elles-mêmes reçu l'*imprimatur* ! En tout état de cause, il n'est pas demandé au censeur « d'affirmer que le livre contient des erreurs, mais seulement qu'il n'est pas dommageable pour la foi et les mœurs des fidèles »[23]. Le code de 1917, dont on vient de célébrer le centenaire[24], l'invitait à n'avoir « devant les yeux que les dogmes de l'Église et l'enseignement commun des catholiques, tel qu'il est contenu dans les décrets des Conciles généraux, dans les constitutions et prescriptions du Saint-Siège et dans la pensée des auteurs approuvés (c. 1393 § 2 *CIC*/17) »[25].

Le *nihil obstat* délivré par le censeur n'emporte pas approbation du contenu de l'ouvrage. Il a moins encore valeur de « recommandation ; il est seulement la reconnaissance négative que rien dans l'ouvrage n'est contraire à la foi ou aux bonnes mœurs »[26]. L'*imprimatur* attestera en outre que « toutes les prescriptions de la loi canonique en la matière ont été remplies »[27]. Les censeurs pourront se servir pour leur examen du *Regolamento per l'esame delle dottrine*, publiée par la Congrégation pour la doctrine de la foi, pour l'examen des doctrines à son échelon suprême[28].

La prudence, requise chez le censeur, est l'« attitude d'esprit de celui qui, réfléchissant à la portée et aux conséquences de ses actes, prend ses dispositions pour éviter des erreurs, des malheurs possibles, s'abstient de tout ce qu'il croit pourvoir être source de dommage »[29]. Si l'on réclame de ceux qui s'adonnent aux sciences sacrées qu'ils expriment leurs opinions avec prudence (cf. c. 218 *CIC* ; c. 21 *CCEO*), à plus forte raison ceux qui sont amenés à peser ces opinions ont-ils avantage à agir selon le même principe.

[23] Pio Vito PINTO, *Commento al Codice di diritto canonico*, Cité du Vatican, Librairie Éditrice Vaticane, 2001, *sub* c. 830, 513.

[24] Cf. Eduardo BAURA, Nicolás ÁLVAREZ DE LAS ASTURIAS e Thierry SOL (dir.), *La codificazione e il diritto nella Chiesa*, Milan, Giuffrè Editore, 2017.

[25] A. CANCE, *Le Code de droit canonique. Commentaire succinct et pratique*, Paris, J. Gabalda & Cie, 1952, t. III, 185-186 (= CANCE, *Le Code de droit canonique*).

[26] G. MARSOT, « Censure », *Catholicisme hier aujourd'hui demain*, Paris, Letouzey et Ané, 1949, vol. II, col. 799.

[27] CDF Instruction, 30 mars 1992, n° 7 § 2.

[28] Cf. CONGRÉGATION POUR LA DOCTRINE DE LA FOI, *Regolamento per l'esame delle dottrine*, 29 juin 1997, publié dans Massimo DEL POZZO, Joaquín LLOBELL, et Jesús MIÑAMBRES, *Norme procedurali canoniche* commentate, Rome, Coletti a San Pietro, 2013, 609-626.

[29] *Le Petit Robert de Paul Robert 1, Dictionnaire alphabétique et analogique de la langue française*, rédaction dirigée par A. REY et J. REY-DEBOVE, nouvelle éd. revue, Paris, Le Robert, 1989, 1558.

Le censeur s'adonnera à sa tâche avec célérité, avec « la plus grande diligence et le plus grand sérieux, compte tenu tant des droits des auteurs (cf. c. 218 *CIC*) que de ceux de tous les fidèles (cf. c. 213, 217 *CIC* ; c. 16, 20 *CCEO*) »[30]. Il est intéressant de souligner ici le renvoi par la Congrégation pour la doctrine de la foi à des droits fondamentaux des fidèles. Si le censeur rencontre des points litigieux dans l'examen de l'ouvrage confié à ses soins, plutôt que de le censurer impitoyablement, il s'efforcera de susciter un dialogue constructif « respectueux et de communion ecclésiale, qui permette de trouver les voies afin que, dans les publications, rien ne se rencontre qui soit contraire à l'enseignement de l'Église »[31].

Dans ce service rendu et à l'Église et aux auteurs, le censeur saura distinguer l'essentiel de l'accessoire. C'est-à-dire ce qui doit absolument être modifié, et qui conditionne l'octroi du *nihil obstat* et de l'*imprimatur*, et ce qui n'est que de simples suggestions laissées à la libre décision de l'auteur. Les remarques dont l'auteur doit absolument tenir compte portent évidemment sur le fond. Elles peuvent être de deux sortes. Les premières ont trait à des points de doctrine ou de morale incompatibles avec l'enseignement autorisé de l'Église catholique. Il ne s'agit pas de nuances, mais vraiment d'affirmations inacceptables ou pouvant semer un grave trouble dans l'esprit des lecteurs. Les remarques peuvent porter en second lieu sur des affirmations qui, sans être franchement erronées, sont insuffisamment précises, ambiguës et prêtent à des interprétations s'écartant de la doctrine de l'Église. Le censeur demande à juste titre la rectification de ces deux catégories de données, et subordonne l'octroi de l'*imprimatur* à l'effectivité de ces corrections de fond.

Tout autres sont les suggestions relatives à la forme. Nous parlons de « suggestions », car ce ne saurait être en aucun cas l'intimation de procéder à des changements de forme sous peine de se voir refuser l'*imprimatur*.

Ces suggestions peuvent être très variées. Mentionnons, à titre d'exemples : les coquilles, les fautes éventuelles de traduction, des questions de style (qui, par nature, sont très personnelles et demandent un très grand respect) et de ponctuation, des références bibliographiques peut-être trop anciennes et qui gagneraient à être actualisées. Ces suggestions peuvent porter aussi sur le contenu, en attirant l'attention de l'auteur sur tel ou tel point qu'il aurait pu être opportun de traiter ; ou sur l'intérêt qu'il y aurait à clarifier tel passage apparemment trop abscond. Mais le censeur doit être particulièrement attentif à la nature de l'ouvrage telle que l'auteur l'a normalement annoncée dans

[30] CDF, Instruction, 30 mars 1992, n° 10 § 2.
[31] *Ibid*., n° 10 § 3.

sa présentation. Les exigences ne peuvent pas être les mêmes pour un ouvrage destiné au grand public que pour un travail de spécialiste, pour un ouvrage conçu pour la jeunesse ou pour des personnes d'un certain niveau culturel. L'auteur aura tout avantage à bien préciser le public ciblé pour éviter toute mésentente à ce sujet. De plus l'auteur est souvent obligé de tenir compte des exigences de l'éditeur, qui ne lui laisse habituellement pas toute latitude pour traiter son sujet avec toute l'ampleur souhaitée. Il convient qu'il le fasse savoir aussi au censeur.

Bref, le censeur doit agir « constamment inspiré par un équilibre correct, afin d'indiquer fermement et aimablement la voie de la justice »[32].

En tout cas, ces deux parties, contraignante et optionnelle, devraient être nettement distinguées dans le *votum*. Les suggestions ne sauraient en aucun cas constituer un empêchement à la délivrance du *nihil obstat*. Elles ne peuvent pas avoir de caractère obligatoire ou contraignant.

Agir autrement, c'est-à-dire s'écarter du devoir strict rappelé ci-dessus, reviendrait à porter atteinte à un ensemble impressionnant de droits fondamentaux des fidèles tels qu'ils leur sont reconnus par le droit canonique, à la suite du concile Vatican II. Or, la doctrine reconnaît le caractère constitutionnel du catalogue des droits et devoirs fondamentaux des fidèles et des laïcs codifiés aux canons 204-232. Ce qui emporte leur prévalence sur toute autre disposition du droit, qui doit être interprétée obligatoirement à la lumière de ces droits fondamentaux[33]. Ne pas agir comme décrit précédemment équivaudrait, entre autres, à méconnaître les droits et les devoirs fondamentaux des fidèles « de travailler à ce que le message divin du salut atteigne sans cesse tous les hommes » et donc le droit fondamental de répandre la Parole de Dieu (c. 211 *CIC* ; c. 14 *CCEO*), à « suivre leur propre vie spirituelle » conforme à la doctrine de l'Église et donc le droit fondamental à une diversité de spiritualités dans l'Église (c. 214 *CIC* ; c. 17 *CCEO*), à l'éducation chrétienne (c. 217 *CIC* ; c. 20 *CCEO*), à la « liberté de recherche comme aussi d'expression prudente » dans les disciplines sacrées, « dans les matières où ils sont compétents » (c. 218 *CIC* ; c. 21 *CCEO*), à la bonne réputation (c. 220 *CIC* ; c. 23 *CCEO*), à n'être jugés que selon le droit (c. 221 § 2 *CIC* ; c. 24 § 2 *CCEO*), à « travailler à ce que le message divin du salut soit connu et reçu par tous les hommes » (c. 225 § 1 *CIC* ; c. 406 *CCEO*), à « imprégner d'esprit évangélique et [à] parfaire l'ordre temporel » (c. 225 § 2 *CIC* ; c. 401 *CCEO*), à éduquer chrétiennement leurs enfants, pour ce qui concerne les parents (c. 226 § 2 *CIC* ; c. 627

[32] JEAN XXIII, Discours, 18 novembre 1959.

[33] Cf. LE TOURNEAU, *Droits et devoirs fondamentaux*, entre autres n° 6, 8-10.

§ 1 *CCEO*), à « imprégner leur action d'esprit évangélique » avec le droit fondamental correspondant de liberté légitime dans l'Église en ce qui concerne les matières temporelles laissées à la libre opinion des fidèles du Christ (c. 227 *CIC* ; c. 402 *CCEO*).

Sortir du cadre strict délimité par les canons et ne pas s'en tenir à un esprit de service, qui, encore une fois, doit présider à tout exercice de l'autorité dans l'Église[34], serait une attitude hautement critiquable qui manifesterait à l'évidence l'incapacité de l'intéressé à remplir correctement sa charge – c'est-à-dire dans le respect de la communion ecclésiale (c. 209 *CIC* ; c. 12 *CCEO*) – et justifierait, ou plus exactement même exigerait, que le censeur en question soit au plus tôt relevé de cette charge par l'autorité compétente. La charité est le commandement suprême[35]. Vertu reine, « elle préserve le jugement du danger de froideur et de mépris, tout comme elle en tempère la sévérité éventuelle par la douce délicatesse qu'elle inspire dans les âmes »[36]. En même temps « le titre de censeur ne pourra jamais être invoqué pour appuyer les opinions personnelles de celui qui en aura été revêtu et sera, à cet égard, de nulle valeur »[37].

Tout comme l'évêque diocésain, bien qu'à titre différent et avec une autorité inférieure, le censeur respectera la « juste liberté en ce qui regarde les vérités qui demandent encore à être approfondies » (c. 386 § 2 *CIC* ; c. 196 § 2 *CCEO*), et ce, compte tenu du public auquel la publication est destinée. Il n'est évidemment pas indifférent qu'elle paraisse dans une revue spécialisée ou dans un organe de presse grand public.

Mais il n'appartient pas au censeur de se prononcer sur l'opportunité ou la convenance de la publication de l'œuvre en question. Il peut tout juste faire état dans son *votum* de ses interrogations éventuelles, sans qu'elles aient force contraignante. À moins que l'ordinaire du lieu n'en décide autrement.

[34] Cf. JEAN-PAUL II, const. ap. *Pastor bonus*, introduction, n° 2 : « Il faut comprendre et exercer le pouvoir dans l'Église selon les catégories du service, de manière que l'autorité ait l'aspect pastoral comme caractère principal. » Voir aussi Paul-Marie GUILLAUME, « À la source du magistère de l'Église », *L'Église, servante de la vérité. Regards sur le Magistère,* Essais réunis sous la direction de Bruno LE PIVAIN, Genève, Ad Solem, 2006, 19-34.

[35] Cf. *Diritto canonico e servicio della carità*, a cura di Jesús MIÑAMBRES, Milan, Giuffrè Editore, 2008 ; Javier OTADUY, « Caridad canónica », in *Ius et iura. Escritos de derecho eclesiástico y de derecho canónico en honor del profesor Juan Fornés*, María BLANCO, Beatriz CASTILLO, José A. FUENTES, Miguel SÁNCHEZ-LASHERAS coordinadores, Pampelune, Universidad de Navarra, 2010, 861-877.

[36] JEAN XXIII, Discours, 18 novembre 1959.

[37] PIE X, enc. *Pascendi*, dans *Écrits doctrinaux*, 237.

Ayant moi-même consulté des amis sur l'opportunité de la publication de tel ou tel de mes écrits, ceux-ci ayant agi de même avec moi, m'envoyant le manuscrit d'un ouvrage en préparation, il m'est facile de comprendre l'importance, et l'intérêt pratique pour l'auteur, de procéder comme indiqué précédemment, c'est-à-dire en distinguant nettement les deux niveaux de remarques. L'on peut penser qu'un auteur qui s'adresse au bureau de l'*Imprimatur*, directement ou par l'intermédiaire de son éditeur, est suffisamment sérieux pour prendre en compte de façon appropriée les remarques qui lui sont présentées, y compris lorsqu'il ne s'agit que de simples suggestions.

Rien n'est dit dans le code quant à une rémunération éventuelle du censeur pour le travail effectué, qui est souvent long et prenant. Il paraît logique qu'une rétribution lui soit accordée[38] – elle sera souvent modeste, d'ailleurs – ce qui, au moins dans le cas des laïcs, correspondra au droit fondamental du canon 231 § 2 *CIC* (c. 409 § 1 *CCEO*) à recevoir « une honnête rétribution ».

Le censeur est tenu de remettre son avis à l'ordinaire par écrit – *scripto dare debet* (c. 830 § 3 *CIC* ; c. CC6 § 3 *CCEO*). Cette norme est importante, notamment pour le cas où l'avis serait négatif. Car le censeur devrait alors exposer les raisons motivant cette recommandation à l'ordinaire. Son avis peut donc être positif ou négatif. Quelles conséquences entraîne-t-il ?

2 — *Les suites de l'avis favorable ou défavorable du ou des censeurs*

Il va de soi que l'avis émis par le ou les censeurs au terme de l'étude attentive de l'ouvrage confié à leurs soins ne peut être exprimé que dans une seule alternative : positive ou négative. Nous verrons donc d'abord les suites à donner à un avis favorable à la publication de l'ouvrage en question (A), puis les conséquences d'un avis défavorable (B).

2.1 — Les suites d'un avis favorable à l'octroi de l'*imprimatur*

Si l'avis du censeur est favorable à la publication, c'est-à-dire si le censeur donne le *nihil obstat*, l'ordinaire accordera la permission d'éditer, « selon son jugement prudent », là aussi par écrit, puisqu'il doit mentionner « son nom ainsi que la date et le lieu où la permission a été donnée » (c. 830

[38] Cf. A. Bride, « Imprimatur », *Catholicisme Hier Aujourd'hui Demain*, Paris, Letouzey et Ané, 1960, fasc. 21, col. 1372.

§ 3 *CIC*). Il n'est donc pas nécessaire de mentionner le nom du censeur[39]. Consulté, le Conseil pontifical pour les textes législatifs a précisé que la permission accordée doit bien « être imprimée sur les livres qui sont édités, en indiquant le nom de celui qui l'accorde, le jour et le lieu de la concession »[40]. Il ne suffit donc plus d'indiquer seulement « avec l'approbation ecclésiastique »[41]. La Congrégation pour la doctrine de la foi recommande que la concession fasse une référence explicite au canon correspondant au type d'approbation ou d'autorisation accordé[42], ce qui contribue à préciser la portée de l'acte de l'autorité ecclésiastique[43].

Une fois l'autorisation donnée, il reste à l'auteur et à l'éditeur de décider de publier ou pas l'ouvrage en question.

L'incise « selon son jugement prudent » laisse une « marge de manœuvre » à l'ordinaire du lieu. Il peut, par exemple, accorder une autorisation de publier limitée à un type déterminé de publications, telles des revues spécialisées ou éditées dans une langue déterminée, ou qui exclut d'utiliser l'œuvre dont il s'agit comme livre de texte ou comme instrument catéchétique ; ou demander que l'ouvrage soit accompagné de précisions[44]. La Congrégation pour la doctrine de la foi a rappelé, en ce sens, que, « du moment que l'écrit est susceptible de contenir des opinions ou des questions propres aux spécialistes, ou touchant des milieux particuliers, et pourrait causer du scandale ou de la confusion dans certains milieux ou chez certaines

[39] Mais il n'y a pas d'inconvénient à le faire, alors que sous le régime du code de 1917 le nom du censeur devait être tenu secret. Il ne pouvait être révélé aux auteurs qu'après avis favorable, « de peur qu'il ne soit molesté, et durant le travail de révision et par la suite, s'il a refusé son approbation » (PIE X, enc. *Pascendi*, *Écrits doctrinaux*, 235-237).

[40] CONSEIL PONTIFICAL POUR L'INTERPRÉTATION DES TEXTES LÉGISLATIFS, Réponse du 29 avril 1987, promulguée le 3 septembre 1987, dans *AAS*, 79 (1987), 1249 ; *DC*, 84 (1987), 1031 ; cf. le texte latin et français dans *Code de droit canonique bilingue et annoté*, 3e éd., 6e tirage actualisé avec les réformes législatives de 2015, Montréal, Wilson & Lafleur, 2016, 1776-1777. Pour un commentaire de cette Réponse, cf. E. BAURA, « Il permesso per la pubblicazione di scritti », dans *Ius Ecclesiae*, 1 (1898), 249-256.

[41] Cf. D. LE TOURNEAU, « Imprimatur », *Dictionnaire historique de la papauté*, sous la direction de Philippe LEVILLAIN, Paris, Fayard, 1994, 852-854.

[42] CDF Instruction, 30 mars 1992, n° 7 § 2.

[43] Cf. Carlos J. ERRÁZURIZ M., *Sub* c. 830, *Comentario exegético al Código de derecho canónico*, Instituto Martín de Azpilcueta, Facultad de Derecho Canónico, Universidad de Navarra, obra coordinada y dirigida por A. MARZOA, J. MIRAS y R. RODRÍGUEZ-OCAÑA, Pampelune, EUNSA, 1983, vol. III, 345 (=*Comentario exegético al Código de derecho canónico*).

[44] Cf. José A. FUENTES, « Censura de libros », dans *Diccionario general de derecho canónico*, obra dirigida y coordinada por Javier OTADUY, Antonio VIANA, Joaquín SODANO, et Cizur MENOR, Universidad de Navarra-Thomson Reuters Aranzadi, 2012, vol. II, 48 (=*Diccionario general de derecho canónico*).

personnes, mais pas ailleurs, l'autorisation pourrait être donnée à des conditions déterminées, qui peuvent regarder le moyen de publication ou la langue, et qui, de toute façon, évitent les dangers indiqués »[45].

L'incise que nous commentons laisse entendre aussi que l'ordinaire du lieu n'est pas tenu par l'avis reçu du censeur. Il peut passer outre s'il l'estime nécessaire, agissant alors comme son propre censeur[46]. Semblable situation ne peut sans doute se présenter que de façon exceptionnelle. En effet, la publication d'ouvrages, d'articles scientifiques ou autres relève du droit fondamental codifié au canon 218 *CIC* (c. 21 *CCEO*) sur la « juste liberté de recherche ». Pour que ce canon 218 *CIC* produise tous ses effets[47], quatre conditions doivent être remplies[48] : a) cette liberté ne doit être utilisée que pour une juste cause ; b) ne sont concernés que les domaines dans lesquels l'intéressé est compétent ; c) le résultat ne doit être rendu public qu'avec prudence ; d) la soumission requise au magistère est nécessaire[49]. Mais la prudence de l'autorité dont il s'agit ici est envisagée du point de vue des effets de la publication sur la foi et les mœurs. Mais « il ne semble pas que d'autres considérations prudentielles puissent constituer un motif pour refuser ou mettre des conditions à l'autorisation »[50], sauf cas graves et exceptionnels dans lesquels l'ordinaire prendra un précepte singulier pour interdire une publication déterminée.

a) Que veut dire l'expression *iusta libertas* ? Au sens propre, tout droit fondamental est juste et ce qui est injuste ne peut jamais être un droit. L'expression exclut la libre pensée, c'est-à-dire une pensée qui ferait abstraction de la vérité et du donné magistériel, qui interprète de façon authentique la parole de Dieu, écrite ou transmise[51]. Les indications du magistère ne cherchent nullement à entraver le travail des théologiens et des chercheurs, mais bien à les orienter sur le chemin de la vérité.

45 CDF Instruction, 30 mars 1992, n° 8 § 4.

46 Cf. CORIDEN, dans CLSA *Comm1*, 584.

47 Cf. pour ce qui suit LE TOURNEAU, *Droits et devoirs fondamentaux*, n° 150, 207-208.

48 Cf. L. DE MAERE, « The Rights of Christ's Faithful at the Service of the Ecclesial Communion », dans PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS (dir.), *Ius in vita et in missione Ecclesiae*, 234.

49 On pourra lire : CDF Instruction *Donum veritatis*, *passim* et en particulier les n^{os} 11, 12 et 30 ; cf. *DC*, 87 (1990), 693-701; D. LE TOURNEAU, « Quelle adhésion pour quel Magistère ? », dans *Revue théologique de Lugano*, 2 (1997), 191-203 ; publié aussi dans *Revue juridique*, 6 (1998), 5-18 ; ID., « La détermination du magistère ecclésiastique au long du deuxième millénaire », dans *Revue de droit canonique*, 50 (2000), 263-281, publié aussi sous le titre « A determinação do Magistério Eclesiástico no seguia milênio », dans *Direito & pastoral*, 15 (2001) 7-45 ; ID., « L'adhésion au Magistère ecclésiastique », dans *Studia canonica*, 46 (2012), 51-74.

50 ERRÁZURIZ M., *sub* c. 830, *Comentario exegético al Código de derecho canónico*, 343.

51 Cf. CONCILE VATICAN II, const. dogm. *Dei Verbum*, n° 10/b.

Cette liberté n'autorise toutefois pas l'auteur à apporter de « modifications notables » après avoir reçu l'approbation de son ouvrage[52].

b) La liberté de recherche s'étend aux « *matières où ils sont compétents* ». Cela suppose que chaque professeur travaille « dans la discipline de sa propre compétence, en accord avec les principes et les méthodes de la science, auxquels elle se réfère, dans la limite des exigences de la vérité et du bien commun »[53].

c) La pensée et les résultats des recherches de ceux qui s'adonnent aux sciences sacrées doivent être *communiqués à bon escient*, dans le milieu scientifique opportun, et non au public non spécialisé ni transmis par des organes de presse non scientifiques. Ils ne donnent pas pour acquises des hypothèses ou des conclusions insuffisamment démontrées, en évitant tout risque de scandaliser et de désorienter les fidèles. Les chercheurs respectent aussi, nous l'avons dit, le contenu du magistère[54]. Mais nous pouvons parler en même temps d'un droit des scientifiques à connaître les opinions de leurs collègues[55].

d) Comment *assurer le « respect dû au magistère »*? La rédaction du canon 218 *CIC* reste loin du texte conciliaire, qui parlait de *libertas cogitandi*[56]. C'est en tout cas une exigence du devoir fondamental de communion (cf. c. 209 *CIC* ; c. 12 *CCEO*), qui conduit à exercer cette liberté de recherche et d'enseignement dans la pleine acceptation du magistère. Le législateur n'a pas cru devoir préciser que ce droit devait être vécu *in plena fidelitate erga authenticum Magisterium Ecclesiæ, imprimis Romani Pontificis*[57].

Autre est le cas du refus d'autoriser la publication du texte incriminé.

2.2 — Les conséquences d'un avis défavorable à la publication d'un travail en matière doctrinale ou de mœurs

Si l'ordinaire du lieu n'accorde pas à l'auteur la permission de publier son travail, il « indiquera à l'auteur les raisons de son refus » (c. 830 § 3 *CIC*).

52 CANCE, *Le Code de droit canonique*, 186.

53 JEAN-PAUL II, const. ap. *Ex corde Ecclesiæ*, 15 août 1990, dans *AAS*, 82 (1990), 1475-1509, nº 29.

54 Cf. CDF Instruction *Donum veritatis*, nº 11.

55 Cf. J. HERVADA, *Elementos de derecho constitucional canónico*, Pampelune, Eunsa, 1987, 142.

56 Cf. CONCILE VATICAN II, const. past. *Gaudium et spes*, n° 62.

57 Cf. *Comm*, 12 (1980), 40. Sur la liberté de conscience, cf. R. BERTOLINO, « La libertad de conciencia : el hombre ante los ordenamientos estatales y confesionales », dans *Anuario de derecho eclesiástico del estado*, 3 (1987), 39-68.

Et ce, par écrit, tout décret devant être motivé (cf. c. 51 *CIC* ; c. 1514 *CCEO*), afin de respecter la dignité de l'auteur et sa liberté fondamentale d'expression. Et de lui donner toute latitude pour corriger son écrit ou pour recourir à l'autorité supérieure. Autrement dit, si d'aventure l'auteur se voyait signifier le refus d'*Imprimatur* sans aucune explication, selon un pratique quelque peu obscurantiste, sa bonne renommée serait entamée et il se trouverait discrédité auprès de son éditeur. Pensant de bonne foi être dans le vrai, il se trouverait plongé dans la perplexité et en viendrait à douter de lui-même sans possibilité de rectifier et de revenir sur le « droit chemin ». Un tel comportement, manifestement injuste et contraire à la norme, pourrait également entraîner un préjudice financier, parfois important, pour l'éditeur qui penserait devoir renoncer à la publication d'un ouvrage dont il a déjà supporté les frais de mise et page et de composition.

L'on n'oubliera pas, dans la prise de décision, que lorsqu'une solution théologique ou connexe « n'a pas été censurée par le magistère, ceux qui l'adoptent ne doivent faire l'objet d'aucune espèce de mesure disciplinaire, car, sauf pour ce qui est déjà hors de discussion, le chrétien est libre de se former et d'émettre prudemment une opinion personnelle. C'est pourquoi toute contrainte, directe ou indirecte, dans cette zone de liberté, léserait un droit légitime »[58]. L'enjeu est de taille.

En tout cas, l'ordinaire ne peut pas alors accorder l'*imprimatur*, si ce n'est de façon illicite[59]. S'il entend le faire, il doit demander au préalable un ou plusieurs autres avis qui lui permettront éventuellement de ne pas suivre le jugement défavorable initial du premier censeur ou du collège de censeurs.

Si l'*imprimatur* est refusé, ou si l'autorité répond par le « silence administratif »[60], l'auteur peut élever un recours auprès de l'ordinaire ou, selon les dispositions du droit, devant un autre ordinaire, qui devra être informé du refus (cf. c. 65 § 1 *CIC* ; c. 1530 § 1 *CCEO*) afin d'être en mesure d'apprécier les tenants et les aboutissants de ce refus. Il semble toutefois que tel ne soit pas le cas en droit oriental, où l'autorisation donnée pour la publication

[58] Alvaro DEL PORTILLO, *Fidèles et laïcs dans l'Église. Fondement de leurs statuts juridiques respectifs*, 2e éd. française, Montréal, Wilson & Lafleur, 2012, 78.

[59] Cf. Patrick VALDRINI, dans Collectif, *Droit canonique*, Paris, Précis Dalloz, 2e éd., 1999, n° 381, 241.

[60] Le c. 57 prévoit un délai de trois mois, au terme duquel la réponse est jugée négative. Cf. Andrea BETTETINI, « Silencio administrativo », *Diccionario general de derecho canónico*, vol. VII, p. 314-317. Cependant, « étant donné que l'autorisation constitue une garantie, tant juridique que morale, pour les auteurs, les éditeurs et les lecteurs, celui qui la demande – soit parce qu'elle est obligatoire, soit parce qu'elle est recommandée – a droit à une réponse de l'autorité compétente » (CDF Instruction, 30 mars 1992, n° 10 § 1).

d'un livre n'est pas considérée comme l'octroi d'une grâce, mais comme l'exercice d'un droit de libre expression, selon le canon 21 *CCEO*. Moyennant quoi, le canon 1530 *CCEO*, équivalent du canon 65 *CIC*, n'est pas applicable. L'auteur qui s'est vu refuser l'autorisation peut donc légalement essayer de l'obtenir d'un autre hiérarque[61].

Un recours administratif peut être tout aussi bien porté devant la Congrégation pour la doctrine de la foi compétente pour « tout ce qui touche de quelque façon » à la foi et aux mœurs[62], conformément aux canons 1732-1739 *CIC* (c. 996-1006 *CCEO*).

Un recours contentieux administratif pourra être déposé devant la Signature apostolique contre la décision de la congrégation, mais uniquement pour des aspects de procédure, et non touchant les questions de fond à caractère doctrinal. Pour celles-ci, le seul recours possible serait d'avoir directement recours au Pontife romain, en tant que « Docteur suprême de tous les fidèles » (c. 749 § 1 *CIC* ; c. 597 § 1 *CCEO*)[63].

Conclusion

Nous avons donc examiné successivement la constitution de la charge de censeur au service des ordinaires des lieux et les conditions d'exercice de cette charge. Puis nous avons souligné l'incidence pratique de la conclusion à laquelle le censeur est parvenu, à savoir la convenance ou non pour l'autorité ecclésiastique d'accorder l'*imprimatur* sollicité. Si la Congrégation pour la doctrine de la foi a tenu à publier, en 1992, une instruction sur l'utilisation des instruments de communication sociale[64], l'élargissement impressionnant des moyens de communication sociale auquel nous assistons de nos jours, avec l'apparition non seulement de l'internet, mais aussi des téléphones portables, des SMS, de MMS, de whatsapp, des réseaux sociaux, pourrait demander que les normes en vigueur soient subissent une toilettage.

L'*imprimatur* est-il une garantie absolue d'orthodoxie des doctrines exprimées dans l'ouvrage qui se l'est vu attribuer ? L'on serait en droit de le penser.

[61] Cf. George NEDUNGATT, *A Guide to the Eastern Code*, Rome, Pontificio Istituto Orientale, Kanonika 10, 2002, 487. Le même auteur ajoute que, comme dans le cas des causes de nullité de mariage, le hiérarque peut refuser la demande de l'auteur après deux avis négatifs concordants, tandis qu'il peut l'accorder après un avis positif, à moins que la prudence ne conseille de recueillir deux avis concordants (ID., 488).

[62] Cf. JEAN-PAUL II, const. ap. *Pastor bonus*, art. 48.

[63] Cf. ERRÁZURIZ M., *sub* c. 830, *Comentario exegético al Código de derecho canónico*, 346.

[64] CDF, Instruction, 30 mars 1992, 18-27.

Toutefois, saint Pie X mettait ses frères dans l'épiscopat en garde, en 1909, contre un certain laxisme : « Ne vous laissez pas arrêter, Vénérables Frères, au fait que l'auteur a pu obtenir d'ailleurs l'*Imprimatur* : cet *Imprimatur* peut être apocryphe, ou il a pu être accordé sur examen inattentif, ou encore par trop de bienveillance ou de confiance à l'égard de l'auteur, ce qui arrive peut-être quelquefois dans les Ordres religieux[65] ». L'on reste évidemment perplexe face à cette mise en garde pontificale. Elle n'a certainement pas été formulée sans fondement[66]. Or, il est facile de constater qu'elle reste d'actualité. C'est dire combien les agissements arbitraires que l'on pourrait rencontrer chez certains censeurs, qui imposeraient leur propres opinions, voudraient obliger à citer leurs « relations » peu orthodoxes du point de vue de la foi catholique, et masquer une partie de la vérité, ou encore contraindre un auteur à supprimer la mention d'un fait historique sans explication aucune, qu'il serait d'ailleurs bien en peine de fournir, ces agissements et d'autres du même acabit, seraient gravement dommageables et pour le fidèle concerné et pour la communauté ecclésiale. Et d'autant plus dommageables – et sans doute répréhensibles aussi, d'ailleurs – si les modifications n'étaient pas suggérées, mais imposées comme condition *sine qua non* de la permission d'imprimer. Peut-être faudrait-il voir dans de telles pratiques, si elles étaient avérées, une cause de la désaffection regrettable dénoncée précédemment à l'égard de cette institution, en décourageant les auteurs d'avoir recours aux services de l'*imprimatur*[67]. En revanche, le climat de dialogue qui a été évoqué plus haut permet à l'autorité ecclésiastique de proposer à l'auteur des suggestions non obligatoires. Elles ne porteront évidemment pas sur des points qui seraient clairement en discordance avec la doctrine catholique, mais sur « des aspects qui pourraient être corrigés, clarifiés ou ajoutés à l'écrit afin de l'améliorer. Utilisée avec mesure et un respect empreint de délicatesse envers la liberté légitime des auteurs, cette possibilité peut vivifier l'*imprimatur* et le rendre attrayant, en mettant en évidence sa fonction de service rendu aux auteurs et, par eux, à la communauté ecclésiale »[68].

[65] PIE X, enc. *Pascendi*, n° 69, dans *Écrits doctrinaux*, 233.

[66] La CONGRÉGATION DU SAINT-OFFICE a procédé de fait plus d'une fois au retrait d'ouvrages publiés *cum præscripta licentia ordinariorum* : cf., par ex., décision du 29 mars 1941, *AAS*, 33 (1941), 121.

[67] Cf. James A. CORIDEN, "The End of the Imprimatur", dans *The Jurist*, 44 (1984), 339-356.

[68] ERRÁZURIZ M., *sub* c. 830, *Comentario exegético al Código de derecho canónico*, 346.

Studia canonica 52 | 2018, 159-203
doi: 10.2143/STC.52.1.3285217

EVOLUTION OF PARTICIPATIVE STRUCTURES WITHIN THE PARTICULAR CHURCH SINCE THE TIME OF VATICAN II

LENNOXIE N. LUSABE, CM*

SUMMARY — The author considers the evolution of five participative structures from Vatican Council II to the present. He contends that a good analysis, critique, and interpretation of the law must consider the context in which that law emerges and operates. He considers the development of five selected structures in the particular Church: the diocesan synod, the diocesan finance council, the presbyteral council, the college of consultors, and the diocesan pastoral council.

RÉSUMÉ — L'auteur considère l'évolution de cinq structures de participation à partir du Deuxième Concile du Vatican jusqu'à ce jour. Il affirme qu'une bonne analyse, critique et interprétation du droit doit tenir compte du contexte dans lequel ce droit émerge et opère. Il considère le développement de cinq structures choisies dans l'Église particulière : le synode diocésain, le conseil pour les affaires économiques, le conseil presbytéral, le collège des consulteurs et le conseil diocésain de pastorale.

Introduction

This article presents a canonical analysis of selected canonical participative structures: the diocesan synod, the diocesan finance council, the presbyteral council, the college of consultors and the diocesan pastoral council, paying special attention to their evolution since the Second Vatican Council. The foundational sources of this analysis will be the canons of the 1983 Code of Canon Law and other magisterial documents. This study hopes to establish salient canonical principles for constituting participative structures in the particular Church.

* Assistant Professor, Canon Law, Tangaza University, Nairobi, Kenya.

1 — *The Diocesan Synod*

The diocesan synod is an old and very important canonical institute in the particular Church. Though the Second Vatican Council does not treat it, subsequent canonical and magisterial documents detail its workings.

1.1 — Conciliar Documents

Christus Dominus, no. 36 highly recommends the practice of synods and councils in the Church,[1] but there is no explicit mention of diocesan synods in the Vatican II documents. Since the context of this text is the collaboration between bishops by way of synods and councils in episcopal conferences, it is only by the broadest interpretation that one can include the diocesan synod. In fact, Joseph Galea-Curmi argues that such an interpretation is dubious. At the same time, he points out that "although the Council did not study it explicitly, nevertheless the experience itself of the Council and many elements of the teaching of the Council helped create a renewed understanding and, to a certain extent, a re-interpretation of the diocesan synod."[2]

1.2 — Post Conciliar Documents

Two post-conciliar documents refer to the diocesan synod. The first of these is *Ecclesiae sanctae* III[3] which mentions the diocesan synod in the context of the pastoral council. Number 20 says: "The pastoral council shall be duly constituted. It shall be its duty according to no. 27 of the Decree *Christus Dominus*, 'to investigate, consider, and come to practical conclusions about matters relating to pastoral work' and to assist in preparing for the diocesan synod and carrying out its statutes."[4] Galea-Curmi says that a new element introduced by *Ecclesiae sanctae* III lies in the fact that

[1] SECOND VATICAN COUNCIL, Decree on the Pastoral Office of Bishops in the Church *Christus Dominus*, 28 October 1965 (*CD*), in *AAS*, 58 (1966), no. 36, 692. English translation in *FLANNERY1* (gen. ed.), *Documents of Vatican II*, vol. 1, new revised edition, Northport, Costello Publishing Company, 1992, 586.

[2] J. GALEA-CURMI, *The Diocesan Synod as a Pastoral Event: A Study of the Post-Conciliar Understanding of the Diocesan Synod*, Rome, Lateran Pontifical University, 2005, 43 (=GALEA-CURMI, *The Diocesan Synod as a Pastoral Event*).

[3] PAUL VI, Apostolic Letter motu proprio *Ecclesiae sanctae* I, 6 August 1966, in *AAS*, 58 (1966), 783-787 (=*ES* I), English translation in *FLANNERY1*, 857-862. Note that *Ecclesiae sanctae* III contains norms for implementing the Decree on the Church's missionary Activity *Ad gentes divinitus*. It applies only to mission territories.

[4] *ES* III, no. 20, in *AAS*, 58 (1966), 787; *FLANNERY1*, 862.

the pastoral council, which in a sense is to "represent" the whole people of God, is to be involved in the preparation and implementation of the synod.[5]

The second document is the Directory on the Pastoral Ministry of Bishops, *Ecclesiae imago*.[6] The Directory on bishops treats the following themes relating to the synod: the nature and purpose of the synod, convocation, membership, preparation, celebration, and communication. Most of the issues raised are reproduced in the 1983 Code, so we will not treat them here.

1.3 — The 1983 Code of Canon Law

Canons 460-468 of the 1983 Code regulate the diocesan synod as to its nature and purpose, composition, functions, and cessation. The diocesan synod "is the highest of all diocesan structures of participation in the Bishop's pastoral governance."[7] It is both an act of episcopal governance and an event of communion, thus it expresses the character of hierarchical communion that belongs to the nature of the Church.[8] Indeed,

> the diocesan synod is the occasion for the Christian faithful to build up the Body of Christ (c. 208), to strengthen *communio* (c. 209, §1), to promote the growth of holiness of the Church (c. 210), to evangelize (c. 211), to express their needs and desires (c. 212, §2), to express their informed opinion on matters pertaining to the good of the Church (c. 212, §1), to express their opinion on matters of their expertise (c. 218).[9]

According to Thomas Green, the 1983 Code reaffirms certain 1917 Code provisions about the notion, consultative nature and essential structure of the synod, but it expands its membership and representative character.[10]

[5] GALEA-CURMI, *The Diocesan Synod as a Pastoral Event*, 46.

[6] CONGREGATION FOR BISHOPS, Directory for the Pastoral Ministry of Bishops *Ecclesiae imago* (*EI*), Vatican City, Typis Polyglottis, 1973; English translation by the Benedictine Monks of the Seminary of Christ the King, British Colombia and published in Ottawa by Publications Service of the Canadian Catholic Conference, 1974.

[7] CONGREGATION FOR BISHOPS, Directory for the Pastoral Ministry of Bishops *Apostolorum successores*, 22 February 2004 (*AS* or Directory [2004]), in *AAS*, 96 (2004), Vatican City, Libreria editrice Vaticana, 2004, no. 166, 184.

[8] *AS*, no. 168, 184.

[9] J.A. RENKEN, *Particular Churches: Their Internal Ordering, Commentary on Canons 460-572*, Ottawa, Faculty of Canon Law, Saint Paul University, 2011, 17 (=RENKEN, *Particular Churches: Their Internal Ordering*).

[10] T.J. GREEN, "Selected Legislative Structures in Service of Ecclesial Reform," in *The Jurist*, 71 (2011), 441 (=GREEN, "Selected Legislative Structures in the Service of Ecclesial Reform").

1.3.1 — *Nature and Purpose*

The canons on the diocesan synod are contained in Book II of the revised Code. Book II follows the theological basis established in the conciliar and post-conciliar documents. Instead of concentrating on individuals, as did the comparable parts in the previous Code, it emphasizes the sacramentally-grounded community of believers. It stresses the common mission of all and reflects the shift towards a more genuinely communitarian ecclesiology that must also be present in the participative structures of each particular Church.[11]

Canon 460 describes the diocesan synod. The initial canon specifies the notion and object of the diocesan synod and contains two major changes, which concern synodal participation and the purpose of the synod.[12] The canon states that a diocesan synod is a group of selected presbyters and other members of the Christian faithful of a particular Church who offer assistance to the diocesan bishop for the good of the whole diocesan community. The diocesan synod is a juridical organ of the diocese in which the bishop, making use of the aid and counsel of the various components of the diocesan community, solemnly exercises the office and ministry of shepherding the flock and adapting the norms of the universal Church to the particular situation of the diocese.[13]

Canon 460 further indicates that the purpose of the synod is to assist the bishop in the exercise of the office proper to him, governing the Christian community. Therefore, the synod is contextually and inseparably an action of episcopal governance and an event of communion, thus expressing the hierarchical communion which belongs to the profound nature of the Church.[14]

1.3.2 — *Convocation*

Canon 461, §1 states that a diocesan synod is to be celebrated in individual particular Churches when circumstances suggest it, in the judgement of

[11] L.J. JENNINGS, "A Renewed Understanding of the Diocesan Synod," in *Studia canonca*, 20 (1986), 338 (=JENNINGS, "A Renewed Understanding of the Diocesan Synod").

[12] JENNINGS, "A Renewed Understanding of the Diocesan Synod," 341.

[13] ARRIETA, *Governance Structures within the Catholic Church*, 232. Also on this topic, see A. REHRAUER, "Diocesan Synods," in *CLSAP*, 49 (1987), 1-15 (=REHRAUER, "Diocesan Synods"); F. DANEELS, "De dioecesanis corresponsabilitatis organis," in *Periodica*, 42 (1981), 301-324; JENNINGS, "A Renewed Understanding of the Diocesan Synod," 319-354; and J.A. FUENTES, "Il Sinodo diocesano," in *Ius canonicum*, 42 (1981), 543-466.

[14] CONGREGATION FOR BISHOPS and CONGREGATION FOR THE EVANGELIZATION OF PEOPLES, *Instruction on Diocesan Synods*, cit., I, 1.

the diocesan bishop, after he has heard the presbyteral council (c. 461, §1). This canon contains two new stipulations relative to the frequency of convoking a synod and the need to consult the presbyteral council. As regards the frequency of the synod, the revised Code moves away from the mandated ten-year interval in the 1917 Code.

It is the diocesan bishop alone who convokes a diocesan synod. This is a shift from the 1917 law (c. 357, §1), which allowed a vicar general or a vicar capitular, if given a special mandate to convoke and preside at a synod. Furthermore, the term *episcopus* used in the 1917 Code encompassed not only the resident bishop but others, including the coadjutor bishop.[15]

Even though the diocesan bishop is to convoke the diocesan synod, he must first consult the presbyteral council. At the time of the 1917 Code, there was no presbyteral council. The consultors or the chapter of canons did not fulfill the same role, and there was no suggestion in the 1917 Code that the bishop consult those persons.[16] Of course, the diocesan bishop only needs to hear the council; he decides whether to follow their advice or not. Ann Rehrauer says that "respecting the wisdom of the presbyterate and its relationship to him, the bishop will probably follow the advice because he needs the cooperation and enthusiasm of the presbyterate to insure an effective celebration."[17]

The second paragraph of c. 461 repeats the 1917 Code and permits one synod to be held for two or more dioceses committed to the same bishop, even if he indefinitely acts only as a diocesan administrator. While the 1917 Code explicitly mentioned that the synod be held in a cathedral church or some other reasonable place, the new Code does not identify a place for the synod. Nevertheless, the *Caeremoniale Episcoporum* presumes that the place of the synod is the cathedral church.[18]

1.3.3 — *Preparation and Celebration*

While c. 360 of the 1917 Code spoke of preparatory commissions for the diocesan synod, the 1983 Code makes no mention of the period of preparation.

[15] Cf. B.F. DONNELLY, *The Diocesan Synod: An Historical Conspectus and Commentary,* Canon Law Studies no. 74, Washington, DC, The Catholic University of America, 1932, 49 (=DONNELLY, *Diocesan Synod*).

[16] REHRAUER, "Diocesan Synods," 7.

[17] Ibid., 8.

[18] CONGREGATION FOR DIVINE WORSHIP, *Caeremoniale Episcoporum*, editio typica, 14 September 1984, Typis Polyglottis Vaticanis, 1984, nn. 1169-1176.

However, the question of preparation for the synod is addressed in the *Directory for Pastoral Ministry of Bishops* (treated below).

Canon 465 concerns the actual celebration of the diocesan synod. This canon "leaves the method of celebrating the synod completely in the hands of the diocesan bishop and the synodal members. In so doing, it affirms the rights of the faithful as articulated in the conciliar documents and in the canons already referred to at the beginning of Book II."[19] The sessions of the synod are to involve free discussion of all the members. This right is clarified in the revised Code in the presentation of the obligations and rights of the Christian faithful in Book II, especially their right, and at times their duty, to make known their needs and desires to the pastors of the Church (cf. cc. 212, §§2-3; 218; and 223).

1.3.4 — *Composition*

While the 1917 Code limited membership of the synod to clerics, the 1983 Code expands the membership to include lay people. Some of the clerics in c. 358 of the 1917 Code are retained in the 1983 Code in c. 463, §1: the vicar general, the rector of the diocesan major seminary, the vicars forane, and the canons of the cathedral chapter or the diocesan consultors. To this list, the revised Code adds the coadjutor bishop and auxiliary bishops; the episcopal vicars, the judicial vicar, the members of the presbyteral council, and one priest and a potential substitute from each vicariate forane; lay members of the Christian faithful, including members of institutes of consecrated life, chosen by the pastoral council in a manner and number determined by the diocesan bishop, and some superiors of religious institutes and societies of apostolic life which have a house in the diocese (c. 463, §1). The diocesan bishop has the obligation to convoke these persons. In turn, they have an obligation to participate. The convocation should be done formally by decree. A list should be prepared of those who are officially members of the synod with the right of free discussion and vote.[20]

Paragraph two gives freedom to the bishop to enlarge the membership of the synod. Those invited may be clerics, members of institutes of consecrated life or lay members of the Christian faithful. This flexibility upholds the principle of subsidiarity and recognizes the diversity within particular Churches.[21]

[19] JENNINGS, "A Renewed Understanding of the Diocesan Synod," 349.
[20] Ibid., 346.
[21] Ibid.

The final paragraph of c. 463 states the option of inviting leaders and representatives of other Churches and ecclesial communities to participate in the synod as ecumenical observers. Thomas Green says that the "inclusion of leaders from other Churches and ecclesial communities should foster mutual understanding, clarity, and ecumenical collaboration. Such observers should have a voice even if without a vote."[22] Can a bishop invite Muslims and Jewish representatives at the synod as observers, since the Code only mentions other Churches and ecclesial communities? Green thinks that "Jewish or Muslim representation may be quite desirable in some settings, given increasing interreligious concerns."[23]

1.3.5 — *Functions*

The Directory for the Pastoral Ministry of Bishops *Apostolorum successores* clearly articulates the functions of the diocesan synod as envisioned by the 1983 Code.[24] The Directory says that the diocesan synod is an act of governance and an event of *communio*. It helps the diocesan bishop to lead the diocesan community and is an occasion to apply and adapt universal discipline to the needs of the particular Church.[25] The diocesan synod is a consultative body or assembly, convoked by the bishop, to which presbyters and other faithful of the particular Church are called, in accordance with canonical norms, so as to help the bishop in his task of leading the diocesan community. In and through the synod, the bishop solemnly exercises the office and ministry of shepherding his flock.[26] In its dual dimension as "an action of episcopal governance and an event of communion,"[27] "the synod is a suitable means by which to apply and adapt the laws and norms of the universal Church to the particular situation of the diocese. It indicates the methods to be adopted in diocesan apostolic work, overcomes difficulties arising in the apostolate and the governance of the diocese, inspires activities and initiatives of a general nature, proposes sound doctrine, and corrects any errors of faith or morals that might exist."[28]

[22] GREEN, "Selected Legislative Structures in the Service of Ecclesial Reform," 444.
[23] Ibid.
[24] CONGREGATION FOR BISHOPS, Directory for the Pastoral Ministry of Bishops *Apostolorum successores*, 22 February 2004 (*AS*), Rome, Libreria editrice Vaticana, 2004.
[25] *AS*, no. 166, 184; cf. RENKEN, *Particular Churches: Their Internal Ordering*, 21.
[26] *AS*, no. 167, 184.
[27] POPE JOHN PAUL II, Homily of 3 October 1992, in *OR-E*, 14 October 1993, 7. See also RENKEN, *Particular Churches: Their Internal Ordering*, 23.
[28] *AS*, nos. 168, 184-185.

Canon 466 states that the only legislator in the diocesan synod is the diocesan bishop; the other members of the synod possess only a consultative vote. Only the diocesan bishop signs the synodal declarations and decrees,[29] which can be published only by his authority. Therefore, the results of the sessions must be submitted to the the diocesan bishop. It belongs to him to sanction and to promulgate, when he deems appropriate, the dispositions and decrees drawn up during the synod. Any promulgation which does not bear the signature of the diocesan bishop is invalid,[30] unless it is explicit that the bishop has orally approved the legislation and delegated another person to promulgate it.[31]

1.3.6 — *Cessation*

The 1917 Code did not provide for the cessation of the diocesan synod; therefore, c. 468 of the 1983 Code has no precedent in the 1917 Code. The first paragraph of c. 468, §1 states that the suspension or dissolution of a diocesan synod pertains to the prudent judgement of the diocesan bishop (c. 468, §1). Either action should be accompanied with the formalities of the law. Thus, the diocesan bishop should issue a decree indicating the dissolution or suspension, whether indefinitely or for a stated period of time.[32] The second way for the diocesan synod to cease is when the see is vacant or impeded; in these cases, the synod is interrupted *ipso iure*, until the succeeding diocesan bishop chooses to continue it or to dissolve it (c. 468, §2).

[29] Normally, the decrees of a diocesan bishop are acts of executive power and deal with the administration and good order of his diocese (the exception is the decree of c. 29). If they are made during the synod, they are diocesan laws, usually known as "diocesan statutes" or "synodal statutes." Therefore, the decrees of a synod have legislative force. On the other hand, synodal declarations are acts of *munus docendi* and do not have legislative force or they are acts of the *munus regendi* that serve as guidelines or instructions. Giorgio Corbelline says: "'Declarations' here means those acts that possess a content not directly normative, but rather doctrinal or, in general, guiding; the term 'decrees' means the acts that contain precise decisions of a juridical nature which are required to become a norm of action in that particular Church. The signing by the bishop is the act through which the texts that are developed in the synod, and in some cases, revised afterwards by the bishop, acquire juridical effect or become binding for the particular Church." See CORBELLINI, "The Diocesan Synod," 1074.

[30] Cf. ARRIETA, *Governance Structures within the Catholic Church*, 236.

[31] The pope often approves legislation orally and it is promulgated by the Secretary of State or a body of the Roman Curia. The bishop could do the same.

[32] Cf. G. CORBELLINI, "The Diocesan Synod," in *Exegetical Comm.*, vol. II/2, 1080 (=CORBELLINI, "The Diocesan Synod").

1.4 — Documents after the 1983 Code

The documents to be considered here are the 1997 Instruction on Diocesan Synods and the 2004 Directory on the Pastoral Ministry of Bishops *Apostolorum successores*. The Instruction and Directory are acts of executive power of governance (c. 34, §1). Thus, they set out the provisions of the law, clarify the disposition of the law, and determine and develop those procedures to be adopted in their execution. They are never to derogate from the law (c. 34, §2).

The 1997 Instruction follows in a deductive manner the canons of the 1983 Code concerning the diocesan synod and is divided into five main parts: introduction on the nature and purpose of the diocesan synod, composition of the synod, convocation of the synod, conducting the synod, and synodal declarations and decrees. The beginning of the Instruction includes a quote from *Sacrae disciplinae leges*.

> The Holy Father Pope John Paul II numbered among the principal elements which, according to the Second Vatican Council, expresses the true and genuine image of the Church "the doctrine whereby the Church is presented as the people of God and its hierarchical authority as service; the further doctrine which portrays the Church as a communion and then spells out the mutual relationships between the particular and the universal Church, and between collegiality and primacy; and likewise, the doctrine by which all members of the people of God share, in a manner proper to each of them, in the threefold priestly, prophetic, and kingly office of Christ.[33]

This quote emphasizes that one will find the basis of the synod and its renewal not in a particular quote from the Council but in its experience and teaching, particularly its ecclesiological renewal.[34]

On the composition of the synod, the Instruction requires that the choices made regarding membership should help the synod to be an adequate expression of the true composition of the diocese. It adds that there should be an adequate number of permanent deacons among the clerics.An important contribution of the Instruction is the section which includes proposals regarding the preparatory phase of the synod, which leaves the bishop free to adapt and apply these proposals according to the particular situation of his diocese.[35]

[33] JOHN PAUL II, Apostolic Constitution *Sacrae disciplinae leges*, 25 January 1983, in *AAS*, 75 (1983), pars II, vii-xiv.

[34] GALEA-CURMI, *The Diocesan Synod as a Pastoral Event*, 110.

[35] Cf. CONGREGATION FOR BISHOPS and CONGREGATION FOR EVANGELIZATION OF PEOPLES, Instruction on Diocesan Synods *In constitutione apostolica de synodis dioecesanis agendis*, 19 March 1997 (*ISDA*), in *AAS*, 89 (1997), III, C, 2, 715. English translation in *Origins*, 27 (1997), 327.

The Instruction emphasizes the broad participation of the people in this phase of the synod. It speaks of the manner in which they would have the possibility of expressing themselves on the topics chosen for the synod. It says that this consultation should aim at reaching the whole people of God in the diocese.[36]

The Instruction speaks about the active collaboration of members in the drawing up of the final document and the ministry of the bishop within this process, a ministry which is the antithesis of arbitrariness.[37] The bishop is to listen and to invite people to cooperate in seeking to discern the will of the Spirit of the particular Church.[38] The Instruction says that the synodal "decrees" are true juridic norms in two forms: *constitutions* (or otherwise) and directives for future pastoral programmes. Synodal "declarations," in contrast to decrees, are opportune affirmations of the truth of the Catholic faith or morals, especially in relation to more important aspects of the life of the particular Church.[39] The Instruction does not require that the diocesan bishop issue juridical norms.[40] Thus, it remains the choice of the bishop to see what form should be given to the synod's conclusions. Finally, in the appendix, the Instruction puts forward an important principle of servant leadership for the diocesan bishop, namely "prudence and discretion so as to avoid unnecessary use of power where counsel and persuasion would suffice."[41]

The revised Directory for the Pastoral Ministry of Bishops, *Apostolorum successores*, reflects the Code and the 1997 Instruction relative to diocesan synods. The synod is referred to as "the highest of all diocesan structures of participation in the Bishop's pastoral governance … [It] is both an act of episcopal governance and an event of communion, and thus it expresses the character of hierarchical communion that belongs to the nature of the Church."[42] The diocesan synod is

> a suitable means by which to apply and adapt the laws and the norms of the universal Church to the particular situation of the diocese. It indicates the methods to be adopted in diocesan apostolic work, overcomes difficulties arising in the apostolate and the governance of the diocese, inspires activities and initiatives of a general nature, proposes sound doctrine, and corrects any errors of faith, or morals that might exist.[43]

[36] Ibid.
[37] Galea-Curmi, *The Diocesan Synod as a Pastoral Event*, 113.
[38] Cf. *ISDA*, I, 2, 709, in *Origins*, 27, 325.
[39] *ISDA*, V. 2, 720, in *Origins*, 328.
[40] *ISDA*, Appendix, 722, in *Origins*, 329.
[41] Ibid.
[42] *Apostolorum successores*, no. 166, 184.
[43] Ibid., no. 168, 184-185.

Apostolorum successores states that the membership of the synod "must reflect the diversity of vocations and apostolic undertakings, and the social and geographic variety which characterizes the diocese."[44] Interestingly, in saying that a "prevalent role should be entrusted to *clerics* in view of their office in ecclesial communion,"[45] *Apostolorum successores* seems to suggest that there is concern that the laity might dominate the diocesan synod if their number is disproportionately higher than that of the clergy.

Apostolorum successores outlines the role of the diocesan bishop in number 171. He is to convoke the synod only after consulting the presbyteral council. The synod is to be held as frequently as possible when pastoral circumstances require it. As part of the preparations, the bishop will need to make a pastoral visitation of parishes. He is specifically directed to consult the 1997 Instruction on diocesan synods.[46] Besides requesting the input of the faithful, the diocesan bishop should encourage their prayers for the synod and provide timely information regarding the synod and its preparations.

Apostolorum successores encourages free synodal discussion of issues during the actual celebration of the synod, but it discourages the synod from attempting to address matters reserved to higher authority.[47] Synod texts are to be transmitted to the metropolitan and the episcopal conference to inform them about decisions possibly affecting other particular Churches. While not technically required by the Code, *Apostolorum successores* no. 174 also calls for communication of synod texts to the Holy See.[48] Finally, no. 175 states the possible relevance of the Code and the 1997 Instruction in regulating comparable diocesan forums and similar ecclesial meetings of a synodal nature.[49]

2 — *The Diocesan Finance Council*

The Church has always taken seriously the care for finances. Since the Second Vatican Council, documents from the Holy See have placed great emphasis on the principle of stewardship and the role of the laity in the management of the temporal goods of the Church.

[44] Ibid., no. 169, 185.
[45] Ibid.
[46] Ibid., no. 172, 187.
[47] *AS*, no. 174, 189.
[48] The *ISDA* had stated the same. For more on this, see *ISDA*, V, 5, 721, in *Origins*, 27, 329.
[49] *AS*, no. 175, 190.

2.1 — Conciliar Documents

The Second Vatican Council does not treat the diocesan finance council specifically. Nevertheless, *Gaudium et spes* provides principles that impact the administration of ecclesiastical goods, the supervision of which is the main duty of the finance council, under the authority of the bishop.

Gaudium et spes begins by treating the basic relationship between the Church and the temporal order. The mission of the Church is neither political, economic nor social, but religious. In fact, the impact the Church can have on society should consist of her effective living of faith and love and not in any external power exercised by purely human means in propogating the faith.[50] Imitating the apostles in their use of temporal goods as mere instruments to achieve their ends, their successors should use only those means appropriate to the Gospel message.[51]

The Council brought in another important principle that would affect radically the administration of ecclesiastical goods: the cooperation of the laity. According to the Council, "the laity are called to participate actively in the whole life of the Church; not only are they to animate the world with the spirit of Christianity, but they are to be witnesses of Christ in all circumstances and at the very heart of the community of humankind."[52] This is unlike what is found in the 1917 Code, which had stipulated that the cooperation of the laity in the administration of ecclesiastical goods could be employed only if they acquired this right by the title of foundation or erection or by the will of the local ordinary (*CIC/17*, c. 1521, §2).

2.2 — Post Conciliar Documents

Ecclesiae imago expounds on the diocesan finance council, based on the 1917 Code and *Gaudium et spes*. After stating that a council for administration of temporal goods is to be established in every diocese, in the parishes and other public institutions, the Directory states that such a council, where possible, should be composed of clerics, religious, and lay persons chosen for their expertise, honesty and zeal for the Church and the apostolate.[53]

[50] Cf. SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World *Gaudium et spes*, 7 December 1965 (*GS*), no. 42, in *AAS*, 58 (1966), 1061, English translation in *FLANNERY1*, 942.

[51] Cf. *GS*, no. 76, in *AAS*, 58 (1966), 1099, in *FLANNERY1*, 984-985.

[52] Cf. Cf. *GS*, no. 43, in *AAS*, 58 (1966), 1063, in *FLANNERY1*, 944.

[53] *EI*, no. 135, 132, in the Directory, 69.

With the council, the bishop is to examine the programmes of activities, the order of expenditure, the budgets, and other related activities and make decisions in accord with the law.

> At the end of each year, or on the completion of a project, he [the diocesan bishop] is to see to it that a financial account, checked by the council [the diocesan finance council], is made public, unless prudence dictates otherwise. These same procedures are carried out, under the watchful care of the bishop, by parish councils and councils of other organizations.[54]

Such accountability, both to legitimate superiors and to the faithful, is another example of the renewal in Vatican II, which takes seriously the basic concept of the people of God. Those who contribute to the upkeep of the Church have a right to some accounting indicating the uses to which their contributions were put.[55] Indeed, the council and the post-conciliar documents present a vision of the Church in which involvement by other members of the diocese in the bishop's administration of its temporal goods is a necessary element.

2.3 — The 1983 Code of Canon Law

The Code requires that the diocesan bishop establish a diocesan finance council and provides specific norms governing its composition (c. 492) and functions (c. 493). The Code also requires that the diocesan bishop appoint a diocesan finance officer (c. 494).[56] Just as in the 1917 Code, the finance council holds a special place in the 1983 Code, because of the importance attached to temporal goods for the mission of the Church. Thus, the finance council is to be viewed in the larger context of Book V of the 1983 Code.

The 1983 Code reiterates that the diocesan bishop, as chief shepherd of the particular Church, is responsible for the pastoral needs of his flock and the worldly affairs of his diocese (c. 369). He is the administrator of the temporal goods of the local Church (c. 1279) and the supervisor of all property belonging to the public juridic persons subject to him (c. 1276). To assist him in these tasks, Church law provides for the diocesan finance council (c. 492) and the college of consultors (c. 502). The diocesan finance council exists solely to help the diocesan bishop in finance matters. It is the only participative body directly identified in the 1983 Code as an obligatory

[54] Ibid.

[55] A.G. FARRELLY, *The Diocesan Finance Council: A Historical and Canonical Study*, JCD diss., Faculty of Canon Law, Saint Paul University, Ottawa, 1987, 116 (=FARRELLEY, *The Diocesan Finance Council*).

[56] Cf. RENKEN, *Particular Churches: Their Internal Ordering*, 107.

part of the diocesan curia.[57] The prominence given by the Code to this consultative and consent-giving body underscores its importance in assisting the diocesan bishop in the governance of the diocese.[58]

2.3.1 — *Nature and Purpose*

The diocesan finance council is to be established by the diocesan bishop, who issues the decree of establishment and approves its statutes (c. 492, §1). Since the diocesan bishop is the competent authority to establish the finance council, those whom the law regards as equivalent to him must also do so,[59] and they have this responsibility in those communities which have been entrusted to them.[60]

Though the council is established by the diocesan bishop, it does not depend on him for its continued existence. When the see falls vacant, the college of consultors and the finance council remain functioning, attending to those tasks which the law stipulates (cc. 421, §1 and 423, §2). "Although constituted as a consultative organ, its advice at times can acquire a binding character (cf. c. 1292, §1)."[61] Indeed, the Code does not state anywhere that the diocesan finance council is a consultative body because, in many instances, it must give *consent* before the diocesan bishop is able to act validly. John Renken says that, in those instances when the diocesan bishop must receive its counsel or consent, the finance council has a legal right; if the bishop fails to obtain its counsel or consent before he acts, his action is invalid (see c. 127, §1).[62]

The diocesan bishop presides at the meetings of the diocesan finance council, whether personally or through his delegate. "The role of the 'presidency' in these meetings is distinct from the role of 'chairing' them. Nothing prevents another person from 'chairing' the meetings of the diocesan finance council, under the presidency of the diocesan bishop, personally or through his delegate."[63]

[57] FARRELLY, *The Diocesan Finance Council*, 148.
[58] Ibid.
[59] They include the territorial prelature, territorial abbacy, apostolic vicariate, apostolic prefecture, apostolic administration established on a stable basis, military ordinariate, and Anglican ordinariate. For further details, see cc. 370-371.
[60] FARRELLY, *The Diocesan Finance Council*, 166.
[61] ARRIETA, *Governance Structures within the Catholic Church*, 230.
[62] RENKEN, *Particular Churches: Their Internal Ordering*, 107.
[63] Ibid., 108.

2.3.2 — *Composition*

Canon 492 states that the diocesan finance council is to be composed of at least three persons appointed by the diocesan bishop. This gives the bishop freedom to decide the best number for his diocese, so long as it does not go below three. Three, being an odd number, allows for an absolute majority in a vote when the members are present.[64]

The bishop is free to appoint to the finance council any member of the Christian faithful whom he chooses. However, the members must be skilled in civil law and financial affairs and have outstanding integrity. Since it is the bishop who bestows all offices in the diocesan curia (c. 470), he "must determine the presence of these qualities. The nature of their service to the Church necessarily also requires that the members of the diocesan finance council have appropriate knowledge of canon law."[65] Moreover, the Code excludes from the membership those related to the diocesan bishop up to the fourth degree of consanguinity or affinity (c. 492, §3), that is, "the diocesan bishop's siblings, aunts/uncles, nieces/nephews, and any of their spouses…. The obvious reason for this exclusion is to avoid the appearance of, and accusations of, financial impropriety."[66]

The appointment is for a term of five years, renewable indefinitely.[67] The reappointment for additional terms enables the members of the council to attain a solid understanding of the administration of the temporal goods of the diocese and provide the bishop with sound, reliable advice.[68] There is no mention of the removal of members but, since the bishop is the competent authority to appoint the members to the council, he also has the power to remove them in accord with cc. 192-195. The reasons for such action would need to be grave and according to the manner of proceeding defined by in the statutes or other law (c. 193, §2).

2.3.3 — *Functions*

The diocesan bishop has three functions in his diocese regarding its temporal goods: he represents the juridic person of the diocese (c. 118) and is

64 B. DAVID, "Le conseil diocésain pour les affaires économiques," in *Les cahiers du droit ecclésial*, 2 (1985), 11.

65 RENKEN, *Particular Churches: Their Internal Ordering*, 107-108.

66 Ibid.

67 The 1917 Code determined no time limit for those appointed to the council of administration.

68 FARRELLY, *The Diocesan Finance Council*, 169.

responsible for the ecclesiastical goods which belong to it; he is responsible for supervising the ecclesiastical goods of the juridical persons subject to him (c. 1276, §1); and he administers the goods of a public juridic person which does not have its own administrator (c. 1279, §2). The finance council is to assist the bishop in fulfilling these responsibilities by offering counsel and, in some cases, consent. Arrieta summarises the functions of the diocesan finance council in these terms:

> Besides those cases in which the committee must be consulted by law prior to the fulfillment of certain acts, the principal functions belonging to this committee are the following: a) annual preparation of the budget for the coming year, according to the indications of the diocesan bishop (c. 493 *CIC*); b) drawing up the annual financial statements of income and expenditures at the end of the year (c. 493 *CIC*); c) giving consent for the fulfillment, by the bishop, of extraordinary administrative acts (c. 1277 *CIC*); d) examination of the annual accounts presented to the bishop by all the administrators of ecclesiastical goods under his power of governance (c. 1287, §1 *CIC*); e) definition of the general lines of activity of the administration of the diocesan financial administrator.[69]

Canon 493 identifies two functions of the diocesan finance council: to prepare an annual diocesan budget and to examine the annual diocesan financial report (c. 493). "In practice, the earlier stages of the development of both the budget and the financial report involve many persons. The discipline of c. 493, however, indicates that the diocesan finance council must develop the final versions of each."[70] Canon 493 adds that other functions of the diocesan finance council are found in Book V. However, a function of the finance council found outside of Book V is to choose a temporary diocesan finance officer if the diocesan finance officer is chosen the diocesan administrator *sede vacante* (c. 423, §2). "This provision demonstrates that the diocesan finance council continues to exist during the vacancy of the particular Church; moreover, it is the only instance in the Code when a group of persons (perhaps entirely lay persons) can bestow a diocesan ecclesiastical office, albeit temporarily."[71]

Besides the diocesan finance council, the Code provides for the appointment of a diocesan finance officer by the diocesan bishop. The 1917 Code did not have provisions for a finance officer. Therefore, the 1983 Code restores the practice of the early Church of the bishops employing the services of *econome* to assist them in the administration of ecclesiastical goods.

[69] ARRIETA, *Governance Structures within the Catholic Church*, 231.
[70] RENKEN, *Particular Churches: Their Internal Ordering*, 110.
[71] Ibid., 112.

The finance officer is not included in the Code as a member of the finance council and should not be made one.[72] This is unlike the Eastern Code, which provides that the eparchial finance officer is *ipso iure* a member of the finance council.[73] This may be because

> the Eastern Code requires that an eparchial finance officer be a member of the Christian faithful (i.e., baptized, but not necessarily a Catholic [see *CCEO*, c. 897]; the requirement is not *per se* made in the Latin Code. If, however, the finance officer were to be appointed as a member of the finance council, he or she would need to be a member of the Christian faithful since the requirement is made of members of that council (*CCEO*, c. 492, §1).[74]

In the 1983 Code, the roles assigned to the officer and the council are distinct and, while they will work together, the distinctiveness of the relationship envisaged in the law should be maintained.

Canon 494, §1 states that, in every diocese, after having heard the college of consultors and the finance council, the bishop is to appoint a finance officer truly expert in financial affairs and distinguished in honesty (c. 494, §1). This person may be lay or cleric, man or woman. The routine administration of the diocesan ecclesiastical goods falls on the finance officer (c. 494, §3). The office seeks to achieve unity in direction and governance in financial management of the diocese.[75] The finance officer is responsible for the administration of goods of the diocese under the authority of the bishop, especially as regards the preparation of budgets in conjunction with the finance council. From the income of the diocese, the finance officer is to meet the expenses which the bishop, or others deputized by him, have legitimately authorized. Annually, he will render an account of all such matters to the diocesan finance council. Furthermore, as provided for by c. 1278, the diocesan bishop can entrust to the diocesan finance officer the administration of ecclesiastical goods of a public juridic person that has no administrator.

[72] FARRELLY, *The Diocesan Finance Council*, 185.

[73] *Codex canonum Ecclesiarum orientalium, autoritate Ioannis Pauli PP. II promulgatas, fontium annotatione indice analytico-alphabetico auctus,* Libreria editrice Vaticana, 1989, c. 263, §2. "Oeconomus eparchialis ipso iure est membrum consilii a rebus oeconomicis." English translation *Code of Canon Law: Latin-English Edition, New English Translation*, prepared under the auspices of the Canon Law Society of America, Washington, DC, CLSA, 2001. All references to the canons of the 1990 Code will be styled "*CCEO*, c." for canon and "*CCEO*, cc." for canons, followed by the canon number(s).

[74] J.D. FARIS, "The Codes and Canons of the Eastern Churches and Temporal Goods," in K.E. MCKENNA, L.A. DINARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, CLSA, 1999, 37.

[75] ARRIETA, *Governance Structures within the Catholic Church*, 231.

The term of office of the finance officer is five years, renewable indefinitely. The removal of the officer during his term requires a grave cause, and the bishop must consult with the college of consultors and the finance council beforehand (c. 494, §2).

2.3.4 — *Cessation*

Though the council is established by the bishop, it does not depend on the bishop for its continued existence. When the see falls vacant, the college of consultors and the finance council remain functioning, attending to those tasks which the law stipulates (cf. cc. 423, §2; 502, §2).

> The diocesan finance council does not cease *sede vacante*; presiding at its meetings during the vacancy is the diocesan administrator or his delegate. Indeed, should the diocesan finance officer have been selected the diocesan administrator, the diocesan finance council itself chooses his temporary replacement as diocesan finance officer (see c. 423, §2). In this situation, an ecclesiastical office is conferred, albeit temporarily, by a group whose members may entirely be lay.[76]

Since the members of the diocesan finance council hold an ecclesiastical office, they can be removed from office according to cc. 192-196.[77] Besides removal from office, they can also lose office by resignation or privation (cc. 187-189, 196).

2.4 — Documents after the 1983 Code

Ecclesiae de mysterio is an interdicasterial instruction issued by eight curial dicasteries on the collaboration of lay faithful in the ministry of presbyters.[78] Before *Ecclesiae de mysterio* outlines teachings on specific participative structures, it alludes to the positive results obtained through the structures of collaboration in the particular Church which the Second Vatican Council called for and considered necessary for the life and mission of the

[76] Cf. RENKEN, *Particular Churches: Their Internal Ordering*, 108-109. We would add that this is an example of the exercise of the power of governance by the lay faithful (c. 129, §2).

[77] Ibid., 109.

[78] CONGREGATION FOR CLERGY et al., Instruction on Certain Questions regarding the Collaboration of the Non-Ordained Faithful in the Ministry of Priests *Ecclesia de mysterio*, 15 August 1997 (*EM*), in *AAS*, 89 (1997), 852-877, English translation in *Origins*, 27 (1997-1998), 397-409. *Ecclesiae de mysterio* is negative in tone, emphasizing what the faithful should not do in the Church.

Church as communion.[79] It says: "these ecclesiastical structures so necessary to that ecclesiastical renewal called for by the Second Vatican Council have produced many positive results and have been codified in canonical legislation. They represent a form of active participation in the life and mission of the Church as communion."[80]

Ecclesiae de mysterio emphasizes that the diocesan councils are consultative bodies. Interestingly, the document sets apart the diocesan finance council from the other councils: "Diocesan and parochial pastoral councils and parochial finance councils, of which non-ordained faithful are members, enjoy a consultative vote only and cannot in any way become deliberative structures."[81] The reason for the distinction is that the diocesan finance council, unlike the other councils, has a deliberative vote in some matters.

Apostolorum successores expounds on the law on the diocesan finance council as found in the 1983 Code. According to Thomas Green, the *Directory* does not give as much attention to the finance and pastoral councils as it does to the diocesan synod.[82] *Apostolorum successores*, however, introduces a new element as regards membership in the diocesan finance council. The document suggests that in "those places where the permanent diaconate has been instituted, steps should be taken to arrange the participation of the deacons in finance councils, according to the charism of their order."[83]

3 — *The Presbyteral Council*

The presbyteral council is a post Vatican II development. Its theological framework was laid in the Vatican II Council documents and concretized in *Ecclesia sanctae*. Given its importance as an institutional manifestation of the communion between the diocesan bishop and the presbyters who collaborate with him in the pastoral ministry, several documents have been issued since Vatican II to regulate its operations.

[79] *EM*, Prologue, in *AAS*, 89 (1997), 852, in *Origins*, 27 (1997), 399.
[80] *EM*, art. 5, §1, in *Origins*, 27 (1997), 405.
[81] *EM*, art. 5, §2, 868, in ibid.
[82] T.J. GREEN, "The 2004 Directory on the Ministry of Bishops: Reflections on Episcopal Governance in a Time of Crisis," in *Studia canonica*, 41 (2007), 132 (=GREEN, "The 2004 Directory on the Ministry of Bishops").
[83] *AS*, no. 192, 211.

3.1 — Conciliar Documents

Vatican II introduced a new group and joined it with two existing ones: "also included among the bishops' cooperators in the administration of the diocese are the presbyters who form his senate or council. Such are the cathedral chapter, the board of consultors, or other committees according to the circumstances or ethos of different areas. These institutions, especially the cathedral chapters, should be reorganized, so far as necessary, to meet modern needs."[84] The documents of Vatican II treat the presbyteral council more than the cathedral chapter and the board of consultors. This may be because the presbyteral council is a new creation by the Council, while the other two were already in the the 1917 Code.

The documents that directly deal with the presbyteral council are *Lumen gentium*, *Christus Dominus* and *Presbyterorum ordinis*. *Lumen gentium* starts by explaining how the presbyters who comprise the *presbyterium* help the bishop in the governance of the diocese. It presents the ministerial priesthood as a participation in the priesthood and mission of Jesus Christ and relates it to the ministry of the college of the bishops.

> Christ, whom the Father hallowed and sent into the world (Jn 10:36), has, through his apostles, made their successors, the bishops, namely, sharers in his consecration and mission; and these, in their turn, duly entrusted in varying degrees various members of the Church with the office of their ministry. Thus the divinely instituted ecclesiastical ministry is exercised in different degrees by those who even from ancient times have been called bishops, presbyters and deacons.[85]

Lumen gentium, no. 28, makes it clear that it is through the sacrament of orders that presbyters are consecrated to the three *munera* of Christ. Since bishops and presbyters share in the same priesthood, "the presbyters, prudent cooperators of the episcopal college and its support and mouthpiece, called to the service of the people of God, constitute, together with their bishop, a unique sacerdotal college (*presbyterium*) dedicated as it is to a variety of distinct duties."[86] *Lumen gentium* also places the relationship between the bishop and the presbyters within the broader context of the diocese and the universal Church, a relationship of communion with the aim of building up the entire body of Christ. Of the presbyters, it says:

> In each local assembly of the faithful they represent in a certain sense the bishop, with whom they are associated in all trust and generosity; in part

[84] *CD*, no. 27, in *AAS*, 58 (1966), 687, in *Flannery1*, 579.

[85] Second Vatican Council, Dogmatic Constitution on the Church *Lumen gentium*, 21 November 1964 (*LG*), no. 28, in *AAS*, 57 (1965), 33-34, English translation in *Flannery1*, 384.

[86] *LG*, no. 28, in *AAS*, 57 (1965), 35, in *Flannery1*, 385.

> they take upon themselves his duties and solicitude and in their daily toils discharge them. Those who, under the authority of the bishop, sanctify and govern that portion of the Lord's flock assigned to them render the universal Church visible in their locality and contribute efficaciously towards building up the whole body of Christ (cf. Eph 4:12).[87]

After having laid the foundation for communion in *Lumen gentium*, the Council Fathers repeatedly emphasized in *Christus Dominus* the mutual dependency and unity that should characterize the episcopal-presbyteral relationship.[88] In no. 26 it states: "He [the bishop] should regard them [presbyters] as sons and friends. He should always be ready to listen to them and cultivate an atmosphere of easy familiarity with them, thus facilitating the pastoral work of the entire diocese."[89] Later, the conciliar decree adds:

> The relations between the bishop and the diocesan clergy should be based before all else on supernatural charity, so that their unity of purpose will make their pastoral activity more effective. Therefore, to ensure an increasingly effective apostolate, the bishop should be willing to engage in dialogue with his presbyters, individually and collectively, not merely occasionally, but if possible, regularly.[90]

Presbyterorum ordinis contains a detailed treatment of the presbyteral council. It starts by reemphasizing that through ordination and mission, presbyters are given some share in the threefold function of Christ as priests, prophets, and kings; in addition, the sacrament of orders joins the ministerial priesthood to the episcopal order and differentiates it from the universal priesthood of all the faithful.[91] *PO*, no. 7, also reemphasizes that "all presbyters share with the bishops the one identical priesthood and ministry of Christ. Consequently, the very unity of their consecration and mission requires their hierarchical union with the order of bishops."[92]

Presbyterorum ordinis, like *Christus Dominus*, affirms that "bishops, therefore, because of the gift of the Holy Spirit that has been given to presbyters at their ordination, will regard them as their indispensable helpers and advisers in the ministry and in the task of teaching, sanctifying and

87 Ibid., in *Flannery1*, 385-386.

88 J. Okosun, *The Collaborative Role of the Presbyteral Council in the Governance of a Diocese*, JCD diss., Ottawa, Faculty of Canon Law, Saint Paul University, 2012, 40 (=Okosun, *The Collaborative Role of the Presbyteral Council*).

89 Second Vatican Council, Decree on the Pastoral Office of Bishops in the Church *Christus Dominus*, 28 October 1965 (*CD*), no. 16, in *AAS*, 58 (1966), 680-681, English translation in *Flannery1*, 573.

90 Ibid., no. 28, 687, in *Flannery1*, 580.

91 Cf. *PO*, no. 2, in *AAS*, 58 (1966), 992, in *Flannery1*, 865.

92 Ibid., no. 7, in *AAS*, 58 (1966), 1001, in *Flannery1*, 875.

shepherding the people of God. … On account of this common sharing in the same priesthood and ministry then, bishops are to regard their presbyters as brothers and friends."[93] Hence, bishops "should be glad to listen to their presbyters' views and even consult them and hold conferences with them about matters that concern the needs of pastoral work and the good of the diocese."[94] Such a relationship between bishops and presbyters calls for cooperation and dialogue. Presbyters should not simply be seen as those who carry out the decisions of the bishop. Rather, cooperation involves the active participation of presbyters in the decision-making process of the bishop. Dialogue demands from both the bishop and the presbyters the sharing of ideas and the enabling of humility and openness to accept those ideas which best promote the good of the diocese and the universal Church.[95] With this understanding, *PO*, no. 7 declares, "But for this to be reduced to practice, a group or senate of presbyters should be set up in a way suited to present-day needs and in a form and with rules to be determined by law. This group should represent the body of presbyters and by their advice could effectively help the bishop in the management of the diocese."[96]

3.2 – Post Conciliar Documents

Four post conciliar documents treat the presbyteral council, the first being the decree of Paul VI, *Ecclesiae sanctae*.[97] Whereas conciliar documents had laid the theological foundation for a presbyteral council, *Ecclesia sanctae* established it as a canonical institute in a particular Church. The document called for the establishment of a new institution, distinct from the cathedral chapter and the board of diocesan consultors, both of which were to remain in force and maintain their competence. Number 15 of the document reads:

> There shall be in each diocese a council of presbyters, a group or senate of presbyters, representing the presbyterium, which by its advice will give effective assistance to the bishop in ruling the diocese. The manner and forms of its working are to be determined by the bishop. In this council the

[93] Ibid.

[94] Cf. ibid., no. 7, 1001, in *Flannery1*, 876.

[95] Okosun, *The Collaborative Role of the Presbyteral Council*, 43.

[96] *PO*, no. 7, in *AAS*, 58 (1966), 1002, in *Flannery1*, 876-877.

[97] Paul VI, Apostolic Letter motu proprio *Ecclesiae sanctae I*, 6 August 1966 (*ES I*), in *AAS*, 58 (1966), 757-775, English translation in *Flannery1*, 591-610. Whereas *Ecclesiae sanctae* I is for particular Churches not in mission territories, *Ecclessia sanctae* III implements *Ad gentes divinitus* in mission territories.

> bishop shall hear the views of his presbyters and discuss with them the pastoral needs and the good of the diocese.[98]

This paragraph mandates the establishment of a presbyteral council in every diocese and examines the characteristics and the purpose of the council. No details are given on the manner of operation of the council, which are left to the diocesan bishop. The decree declares that membership of the council shall be only presbyters, most or all of whom shall be diocesan clergy. Since religious presbyters working in the diocese share in the same priesthood and mission of Christ, number 15 of the document mentions the need for their inclusion in the council: "Religious also may be co-opted as members of the council of presbyters insofar as they share in the care of souls and the works of the apostolate."[99]

The document states that the council of presbyters is merely consultative,[100] but its counsel is to be sought and taken seriously by the bishop. The document also specifies that the council of presbyters ceases to exist when the see falls vacant unless, in special circumstances to be recognized by the Holy See, the vicar capitular or apostolic administrator confirms it in existence.[101] The new bishop has the obligation of establishing a new presbyteral council after taking canonical possession of the diocese.[102]

Before *Ecclesiae imago* was issued in 1973, there were two important documents regarding the presbyteral council: the 1970 circular letter of the Sacred Congregation for Clergy, *Presbyteri sacra*,[103] and the 1971 synodal document on the ministerial priesthood, *Ultimis temporibus*.[104] The 1970 circular letter was a response to feedback received from the worldwide episcopate following the implementation of *Ecclesiae sanctae*.[105] The 1971 synodal document came in response to the crisis experienced by many priests after the Second Vatican Council.[106] It focussed on several issues, among

[98] *ES* I, no. 15, §1, in *AAS*, 58 (1966), 766, in *FLANNERY1*, 600.

[99] Ibid., no. 15, §2, 766, in *FLANNERY1*, 600.

[100] Cf. ibid., no. 15, §3, 766, in *FLANNERY1*, 600.

[101] Ibid., no. 15, §4, 766, in *FLANNERY1*, 600.

[102] Ibid.

[103] SACRED CONGREGATION FOR THE CLERGY, Circular Letter on the Presbyteral Council *Presbyteri sacra*, 11 April 1970 (=*PS*), in *ASS*, 62 (1970), 459-465, English translation in *CLD*, vol. 7, 383-390.

[104] SYNOD OF BISHOPS, document *Ultimis temporibus*, 30 November 1971 (=*UT*), in *AAS*, 63 (1971), 897; English translation in *CLD*, vol. 7, 342-365.

[105] Cf. S.C. for the Clergy, Circular Letter *Presbyteri sacra* (=*PS*) 11 April 1970, no. 4, in *AAS*, 62 (1970), 461; *CLD*, vol. 7, 386.

[106] SYNOD OF BISHOPS, 30 November 1971, synodal document "On the Ministerial Priesthood" *Ultimis temporibus* (=*UT*), Introduction, in *AAS*, 63 (1971), 898, in *CLD*, vol. 7, 343.

which is the relationship between bishop and presbyters in the diocese. This topic brought out the importance of the presbyteral council.[107]

The circular letter reiterates the theological underpinning of the presbyteral council: "Presbyters called to the service of the people constitute one presbyterate with their bishop although, of course, it takes in different duties. As a result, in every diocese there exists between the bishop and all the presbyters a hierarchical communion which joins them closely and makes them one family in which the father is the bishop."[108] Number 5 of the letter states: "[from] the hierarchical communion which exists between the bishop and the presbyters, there necessarily follows the scope and function of the presbyters' council which, to be sure, somehow manifests in an institutional manner that very communion. As a result, the establishment of this kind of council, to be carried out in each diocese in accord with the motu proprio, *Ecclesiae sanctae*, is prescribed as obligatory."[109] The document is clear that the presbyteral council does not possess a deliberative vote. Consequently, it is not competent to make decisions which bind the bishop, unless universal law of the Church provides otherwise or unless the bishop in individual cases believes it appropriate to give the council a deliberative vote.[110] Though it is a consultative organ, "by its nature and its procedural process it is preeminent among other organs of the same kind."[111]

According to no. 8, "the competence of the presbyters' council is to assist the bishop by its counsel in the government of the diocese. Therefore, questions of major moment, whether they pertain to the sanctification of the faithful or the doctrine to be given to them or to the general administration of the diocese, should be treated by the council, if, that is, the bishop proposes them or, at least, admits them for consideration."[112] Number 5 reiterates that the purpose of the presbyteral council is for common consultation and dialogue. It says that, through the presbyters' council,

> contact [of the bishop] with the presbyters is made easier; their views and desires are better known; again, more accurate information on the state of the affairs in the diocese can be derived; mutual experiences can be more fittingly communicated; the needs of the pastors and of God's flock are more clearly apparent; apostolic enterprises accommodated to today's circumstances are

[107] OKOSUN, *The Collaborative Role of the Presbyteral Council*, 50.
[108] Cf. *PS*, no. 1, in *AAS*, 62 (1970), 459-460, in *CLD*, vol. 7, 384.
[109] *PS*, no. 5, 461, in *CLD*, vol. 7, 386.
[110] Ibid., no. 9, 463, in *CLD*, vol. 7, 388.
[111] Ibid.
[112] Ibid., no. 8, 463, in *CLD*, vol. 7, 388.

> harmoniously undertaken; finally, through shared labor difficulties are adequately resolved or, at least, explained.[113]

Number six of the letter examines the composition of the council. It says that the presbyters' council should express the whole presbyterate of the diocese: "Consequently, the representative character of the council is effected if, in as far as it is possible, the following are represented within its make-up: (a) the different ministries (pastors, assistants, chaplains, etc); (b) the regions or pastoral zones of the diocese; (c) the different age groups or generations of presbyters."[114] To be included are the "religious who exercise the care of souls in the diocese or give themselves to the works of the apostolate under the jurisdiction of the bishop."[115] The majority of the members of the council are to be selected by vote of all the presbyters; other members are to be designated directly by the bishop or declared to be members by the very fact that they hold an office which should be represented in the council (e.g., vicar general, rector of the seminary, etc).[116] This kind of representation is meant to foster the confidence of the presbyters that they are represented in the council as well as giving the bishop assurance of maintaining a balance.

Number 9 says that, since the presbyteral council is a sign of hierarchical communion, consultations must be entered into for the good of the diocese in union with the bishop, never without him. This demands on both sides that their mind be aptly prepared and receptive to profound change of views, in humility and patience. "When this joint effort has been completed, the decision then belongs to the bishop who is bound by personal responsibility to the section of the People of God entrusted to him. Consequently, the diligence of the council is a help to and not at all a substitute for the bishop's responsibility."[117]

Number 10 of the letter declares that it is only the presbyteral council that is to be referred to as the senate of the bishop. Thus, "the title and function of the bishop's senate in the government of the diocese belongs only to the presbyters' council. However, with regard to the earlier senate of the bishop, that is, the cathedral chapter where it exists, and the board of consultors where that is had … the said institutions should retain their own proper functions and competency until they are revised."[118] The presbyteral council

[113] *PS*, no. 5, 462, in *CLD*, vol. 7, 386.
[114] Ibid., no. 6, 462, in *CLD*, vol. 7, 387.
[115] Ibid.
[116] Ibid., no. 7, 463, in *CLD*, vol. 7, 387.
[117] Ibid., no. 9, 464, in *CLD*, vol. 7, 389.
[118] Ibid., no. 10, 464, in *CLD*, vol. 7, 389.

ceases when the episcopal see is vacant and the cathedral chapter or group of consultors proceed to elect a vicar capitular, in accord with cc. 477 and 429-444 of the 1917 Code of Canon Law.

Ultimis temporibus came in response to the crisis experienced by many priests after the Second Vatican Council. The 1971 Synod of Bishops, in its document on the ministerial priesthood in the section, "Priests in the Communion of the Church," under the subheading "Relations between Presbyters and Bishop," addressed not only the nature of the council of presbyters but also its scope and the spirit that should guide its functioning. According to the document:

> the presbyters' council, which is of its nature something diocesan, is an institutional manifestation of the brotherhood among presbyters which has its basis in the sacrament of Orders. The activity of this council cannot be fully shaped by law. Its effectiveness depends especially on a repeated effort to listen to the opinions of all in order to reach a consensus with the bishop, to whom it belongs to make the final decision.[119]

If this is done with the greatest of sincerity and humility and if all one-sidedness is overcome, it will be easier for the council and the bishop to provide for the common good. Thus, the goal of the council is to promote the mission of the Church. Accordingly, "the presbyters' council is an institute in which presbyters recognize, at a time when variety in the exercise of their ministry increases every day that they are mutually complementary in serving one and the same mission of the Church."[120] To achieve this goal, the council is to focus on specific objectives: "it is the task of this council, among other things, to seek out clear and distinctly defined aims, to suggest priorities, to indicate methods of acting, to assist whatever the Spirit frequently stirs up through individuals or groups, and to foster the spiritual life, whence the necessary unity may more easily be attained."[121] The synod document also stresses the need for the religious presbyters to collaborate with the bishop. It says: "supportive work on the part of religious presbyters with the bishop in the presbyterate is necessary, even though their activity provides mighty help to the universal Church."[122]

The Directory on the Pastoral Ministry of Bishops, *Ecclesiae imago*, was issued two years after *Ultimis temporibus*. One highlight of *EI* is its furtherance of the specific nature of the council of presbyters. Although the Directory does not add anything to the evolving discipline on the role of the

[119] *UT*, II, 1, in *AAS*, 63 (1971), 919, in *CLD*, vol. 7, 362.
[120] Ibid.
[121] Ibid.
[122] *UT*, II, 1, 920, in *CLD*, vol. 7, 362.

presbyteral council, it reemphasizes those issues mentioned in previous documents as a reminder to the bishops of the indispensable collaborative role of this council in the diocesan governance. "The hierarchical communion of the bishop and his presbytery, founded on the unity of the ministerial priesthood and mission, manifests itself in some way, i.e., in an *institutional* form and works for the welfare of the diocese through the [presbyteral council]…."[123] The Directory adds that the council of presbyters is to have its own constitution and rules determined by law subject to the approval of the bishop, after taking into account what the Apostolic See and the episcopal conference have said in this matter. Finally, *Ecclesiae imago* echoes the call to the episcopal conference to form common plans and formulate guidelines which each bishop will follow and adapt to his own diocese on matters relating to the presbyteral council, the pastoral council, their mutual relationships and cooperation with other consultative bodies.[124]

3.3 — The 1983 Code of Canon Law

The Code mandates the establishment of a presbyteral council in every diocese.[125] Canons 495-501 identify the presbyteral council as the senate of the diocesan bishop, assisting the bishop in the pastoral governance of a diocese. The following themes are considered in these canons: establishment of the presbyteral council (c. 495); its statutes (c. 496); composition (cc. 497-499); functions (c. 500); and cessation (c. 501). Canon 502 describes the relation between the presbyteral council and the college of consultors.

The presbyteral council was formalized in the 1983 Code to broaden the role of the existing *senatus* of the bishop, the cathedral chapter, or

[123] *EI*, no. 203, 103-104.

[124] *EI*, no. 203, e, 199.

[125] Canon 495, §2 states that "in apostolic vicariates and prefectures, the vicar or prefect is to establish a council of at least three missionary presbyters whose opinion, even by letter, he is to hear in more serious matters."

Military ordinariates also have a presbyteral council. See JOHN PAUL II, Apostolic Constitution *Spirituali militum curae*, 21 April 1986 (*SMC*), in *AAS*, 78 (1978), 481-486, English translation in *CLD*, 10 (1986-1990), 312-317. Specifically, *SMC*, no. VI, §5 provides for the establishment of a presbyteral council in a military ordinariate.

The ordinariates for former Anglicans have a similar structure. See BENEDICT XVI, Apostolic Constitution *Anglicanorum coetibus*, 4 November 2009 (*AC*), in *AAS*, 101 (2009), 985-990, English translation in *Origins*, 39 (2009-2010), 387-390. *AC*, no. 10, § 1 provides for the establishment of a governing council with its own statutes approved by the ordinary and confirmed by the Holy See. Paragraph two adds that the governing council is to be presided over by the ordinary and its functions are those of the presbyteral council and the college of counsultors, as outlined in the 1983 Code.

consultors.[126] The intent of the Fathers at Vatican II seemed "to have been to expand both the breath of representation and the seriousness of involvement of the existing body, rather than to create something new or even parallel to the existing *senatus*."[127] The presbyteral council is the institutional manifestation of the communion between the diocesan bishop and the presbyters who collaborate with him in ministry. For this reason, the collaborative function with regard to the bishop, carried out by the cathedral chapter in the 1917 Code, has been assumed in the 1983 Code by the presbyteral council and the college of consultors.[128]

3.3.1 — *Nature and Purpose*

Canon 495, §1 states that the presbyteral council is a group of presbyters which, representing the *presbyterium*, is to be like a senate of the bishop and which assists him in the governance of the diocese according to the norm of law, to promote, as much as possible, the pastoral good of the portion of the people of God entrusted to the bishop (c. 495, §1). The presbyteral council represents the presbyterate as a whole and various functions, positions, and tasks associated with it. The presbyteral council is a collegial institution with an obligatory character and exclusively diocesan scope.[129]

Canon 500, §2 states that the presbyteral council possesses only a consultative vote; the diocesan bishop is to hear it in affairs of greater importance, but he needs its consent only in cases expressly defined by law (c. 500, §2). This implies, in the strictly juridical sphere, the advice of the presbyteral council is limited to those matters that the bishop submits to its consideration, with the exception of a few matters that require consent as identified in the law.

Canon 496 states that the presbyteral council is to have its own statutes approved by the diocesan bishop, attentive to the norms issued by the conference of bishops. Canon 94, §1 defines statutes as ordinances established according to the norm of law in aggregates of persons or of things, which define their purpose, constitution, government and method of operation. The statutes should be approved by a decree of the diocesan bishop (c. 48). The presbyteral council is convoked and presided over by the bishop (c. 500, §1). The Code does not

[126] J.H. PROVOST, "Presbyteral Councils and College of Consultors: Current Law and Some Diocesan Statutes," in *CLSAP*, 49 (1987), 194 (=PROVOST, "Presbyteral Councils and College of Consultors").

[127] PROVOST, "Presbyteral Councils and College of Consultors," 194.

[128] ARRIETA, *Governance Structures within the Catholic Church*, 237.

[129] Ibid., 237.

determine how often the bishop should convoke the council; this should be specified in the statutes, after taking into consideration the norms of the conference of bishops.[130] It also belongs to the bishop to determine the questions to be treated or, at least, to gather the proposals of the members for discussion, always keeping in mind the universal laws of the Church.[131]

3.3.2 — *Composition*

Canons 497-499 address various issues relating to the membership of the presbyteral council. The Code is silent in regard to the total number of members on the presbyteral council. It will be the task of the diocesan statutes, following the norms emanating from the conference of bishops, to determine this.[132] Canon 497 provides three means of becoming a member of the presbyteral council: 1) the presbyters elect freely from among themselves about half of the council (*dimidia circiter pars*), in accordance with the discipline of cc. 498-499 and the statutes;[133] 2) some presbyters belong to the presbyteral council *ex officio*, by reason of their offices in the diocese;[134] and 3) the rest of the members are appointed by the bishop (c. 497). In this way, members of the council would be considered as representing the whole *presbyterium* of the diocese. Because the presbyteral council is founded on the common participation of the bishop and his presbyters in the same priesthood and ministry, membership in it is reserved to (*sacerdotes*), that is, presbyters and bishops.[135] Thus, auxiliary bishops may be members even though the council is titled "presbyteral."

Canon 498 identifies those who have *active* right (i.e., the right to elect) and *passive* right (i.e., the right to elect and be elected) in an election to the council. The *active* and *passive* rights are held by (a) all priests incardinated in the diocese and (b) priests (diocesan and religious) who reside in the diocese and exercise some office for the good of the diocese. Furthermore, the statutes can confer active and passive rights on other priests with a domicile or quasi-domicile in the diocese (c. 498, §1): "The formulation of this canon makes one think that the determining element for a priest to have active and passive vote in the elections is that he has a specific task for the welfare of the diocese. The other elements, residence, domicile, quasi-domicile, incardination, consecrated

[130] OKOSUN, *The Collaborative Role of the Presbyteral Council*, 84.
[131] Cf. *CIC*, c. 500, §1. See also ARRIETA, *Governance Structures within the Catholic Church*, 238.
[132] ARRIETA, *Governance Structures within the Catholic Church*, 239.
[133] Cf. RENKEN, *Particular Churches: Their Internal Ordering*, 129.
[134] Ibid.
[135] Cf. *PO*, no. 7, in *AAS*, 58 (1966), 1001-1002, in *FLANNERYI*, 875-877; *EM*, art. 5, §1.

life, are complementary, or specifying."[136] Canon 499 leaves the manner of electing the members to the statutes, emphasizing that the election must be done in such a way that the members chosen represent the whole *presbyterium* of the diocese, taking into account the different ministries and various regions (c. 499).[137]

3.3.3 — *Functions*

Canon 500, §2 says that the presbyteral council has a consultative nature. The diocesan bishop is to hear it in affairs of greater importance but needs its consent only in cases expressly defined by law (c. 500, §1). There is no instance in the Code in which the consent of the council is required, although this could be a requirement of particular law. One canon allows the presbyteral council to act in a fashion that is similar to consent. Canon 1742, §1 speaks of a list of pastors (*parochi*) established by the presbyteral council upon the proposal of the bishop.[138] The diocesan bishop accepts the choice of this group of pastors whom the diocesan bishop must consult in the removal (c. 1745, 2°) or involuntary transfer (c. 1750) of a pastor. In this situation, the diocesan bishop proposes the names of the *parochi*, and the council chooses some from among those proposed.[139]

The following are the cases in which the counsel of the council is mandatory: 1) to convoke a diocesan synod (c. 461, §1); 2) to establish, supress or modify parishes (c. 515, §2); 3) to decide the destination of the offerings of the faithful and the remuneration of presbyters for carrying out parochial functions (cf. c. 531); 4) to create parish councils in the diocese (c. 536, §1); 5) to erect a new church building (c. 1215, §2); 6) to relegate a church to profane but not sordid use (c. 1222, §2); and 7); and to impose ordinary and extraordinary diocesan taxes (c. 1263). The final section of c. 500 makes it clear that the presbyteral council can never act without the bishop, and it pertains to the bishop alone to determine which matters discussed or decisions reached in the council are to be made public. Besides giving counsel to the diocesan bishop, the presbyteral council is to choose two members to take part in a particular council with a consultative vote (c. 443, §5). All its

[136] M. MARCHESI, "Active and Passive Right of Election," in *Exegetical Comm*, vol. II/2, 1206.

[137] Cf. RENKEN, *Particular Churches: Their Internal Ordering*, 131.

[138] Thus, the selection of the pastors by the presbyteral council in c. 1742, §2 is not the consent of c. 127. It is equivalent to a canonical election. The bishop proposes some names, and from these candidates the council chooses the ones that it wants. It is the council that acts definitively in the composition of the list of names.

[139] Cf. RENKEN, *Particular Churches: Their Internal Ordering*, 134.

members are to take part in the diocesan synod with a consultative vote (c. 463, §1, 4°).

3.3.4 — *Cessation*

According to c. 495, §1, the presbyteral council is a permanent and obligatory body. Canon 501, §2 states that the presbyteral council is dissolved when the see is vacant, but the new diocesan bishop must establish it within a year of taking canonical possession of the diocese. Since the members of the presbyteral council have terms of office, they cease to be members in accord with the law (cc. 184-196) and the statutes. The statutes should provide a way in which not all members finish their terms at the same time, so there is continuity. Thus, every five years, there will be a change in the composition of the council (c. 501, §1). If a member of the council is also a member of the college of consultors, his membership on the college of consultors does not cease when his membership on the presbyteral council ceases. When the council is first established, the terms of members should be spread out: some to have two-year terms, some three, etc. When members' terms expire, new members with the same length terms succeed the former members, keeping everyone on a different termination schedule.

Canon 501, §2 addresses the issue of dissolution of the council, which occurs in two ways. When the see is vacant, it is dissolved by virtue of the law, since the council is not able to act without the bishop. It also can be dissolved by the bishop when he deems it opportune, based on the fact that this council is established to promote the pastoral welfare of the diocese.[140] As mentioned above, due to its connection with the bishop, the presbyteral council loses its function when the diocesan see falls vacant, until the new diocesan bishop constitutes a new council within the year following his taking possession of the diocese: "After he has taken canonical possession, the college of consultors no longer substitutes for the presbyteral council. The college of consultors replaces the presbyteral council only *sede vacante*."[141]

3.3.5 — *Documents after the 1983 Code*

Since the promulgation of the 1983 Code, a number of documents from the Holy See reference the uniqueness of the presbyteral council and the significance of the collaborative role of this council in the governance of a diocese.

[140] Cf. Okosun, *The Collaborative Role of the Presbyteral Council*, 88.
[141] Renken, *Particular Churches: Their Internal Ordering*, 137.

They include *Ecclesiae de mysterio*, *Pastores gregis* and *Apostolorum successores*. Since much has been written in recent years in relation to these documents, it is not necessary to repeat all the insights in these other writings.[142]

4 — *The College of Consultors*

The college of consultors is a diocesan organ created by the Second Vatican Council in *Christus Dominus* and established as a canonical institute by the 1983 Code. It has, as its precedents, the diocesan consultors (cc. 423-428) and the cathedral chapter (cc. 391-422) of the 1917 Code. Both the diocesan consultors and the cathedral chapter acted as the senate of the bishop and governed a diocese *sede vacante* and *sede impedita*.

The college of consultors is briefly treated in one post conciliar document, namely, the Directory on the Pastoral Ministry of Bishops. *Ecclesiae imago*, no. 205 gives a synopsis of the diocesan consultors and the cathedral chapter, whose functions would later be assumed by the college of consultors. It says that the cathedral chapter and the diocesan consultors are among the bishop's closest collaborators in the governance of the diocese. The bishop is to ask opinions of the canons or consultors in cases prescribed by universal law, particularly regarding financial affairs. The bishop, as a father, is to show them kindness and respect, receiving their advice gratefully, and willingly using their help in special business. He is to entrust to the canons of the chapter the worthy and holy celebration of the liturgy for the cathedral church.[143]

4.1 — The 1983 Code of Canon Law

The 1983 Code requires every diocese to have an operative college of consultors: "The *collegium* has precise *munera* to perform, both routinely

[142] See C.J. Reid, "Some Applications of Principles of Management Theory to Diocesan Structures," in *The Jurist*, 44 (1984), 448-456; T.J. Green, "Selected Legislative Structures in Service of Ecclesial Reform," 422-449; P.S. Brennan, "Collaboration, Consultation, and *Communio* between Bishops and Presbyters: Structures and Issues," in *CLSAP*, 68 (2006), 87-108; H.R. Vilamil, Legislation on the College of Consultors: Evolution and Commentary on Some Aspects, JCD diss., Rome, Pontificium Athenaeum Sanctae Crucis, 1996. See also L.N. Lusabe., *An Analysis of Participative Structures in Selected Particular Churches in Eastern Africa in Light of the 1983 Code of Canon Law*, JCD diss., Ottawa, Faculty of Canon Law, St. Paul University, 2017.

[143] Cf. *EI*, no. 205, 202.

and when the see is impeded or vacant. Sometimes it functions with a consultative nature, but other times it functions in a deliberative way. Its members are elected by the diocesan bishop from among the *sacerdotes* [bishops and presbyters] serving on the presbyteral council."[144] The Code draws a close connection between the presbyteral council and the college of consultors, since both bodies act as *senatus* to the diocesan bishop. Thus, the Code attempts to assure coordination and cooperation between the consultors and the presbyteral council by drawing the membership of the college of consultors from the members of the presbyteral council. This dual membership of the consultors is also intended to assure that the consultors will be aware of the issues the presbyteral council deals with and can carry on the functions of the presbyteral council during the vacancy of the see.[145]

The Code presents the nature, purpose, composition and cessation of the college of consultors in c. 502. The functions of the college are spread out in the Code. In many ways, this canonical institute succeeds to the diocesan consultors of the 1917 Code.

4.1.1 — *Nature and Purpose*

Canon 502, §1 states that the diocesan bishop freely appoints some presbyters from among the members of the presbyteral council, in a number not less than six nor more than twelve, to constitute for five years a college of consultors (c. 502, §1). The canon employs the term "college" to mean that the members act as a unified body.[146] As a college, it is an aggregate of persons. Due to the reduced composition and simplified convocation of the college of consultors, the bishop is provided with uninterrupted assistance in the more urgent affairs of governance.[147]

The Code enumerates specific instances wherein the diocesan bishop or the diocesan administrator is required to obtain either the consent or counsel of the college of consultors.[148] For the bishop or administrator to obtain either consent or counsel, he must convoke the members of the college, who give consent or counsel as a group. While convocation does not necessarily imply the physical presence of members, this is a requirement for elections. Thus, the election of a diocesan administrator requires that all members of

[144] RENKEN, "The College of (Eparchial) Consultors," 445.

[145] R.E. HEMBERGER, Consultation in the 1983 Code of Canon Law, JCL thesis [unpublished], Washington, DC, The Catholic University of America, 1985, 150-151.

[146] Cf. c. 115, §2.

[147] ARRIETA, *Governance Structures within the Catholic Church*, 240.

[148] For more details on the notions of consent and counsel, refer to *CIC*, c. 127.

the college must be informed and summoned to attend the meeting.[149] "The college of consultors after being legitimately convoked by its presiding officer is considered duly constituted when it obtains the required constitutional quorum."[150] Once a quorum is obtained, the college can proceed to deal with the matters to be decided.

Paragraph two of c. 502 treats the question of who presides over the college of consultors. The diocesan bishop presides, but when the see is impeded or vacant, the one who temporarily takes the place of the bishop or, if he has not yet been appointed, the priest who is senior in ordination in the college of consultors presides (c. 502, §2). The diocesan bishop is not a voting member of the presbyteral council and neither the diocesan bishop nor the diocesan administrator is a voting member of the college of consultors. He is ineligible to vote on the matters on which the body is to give him counsel or consent.

4.1.2 — *Composition*

Canon 502, §1 is on the college's membership. The college must consist of six to twelve priests (*sacerdotes*), inclusive, each of whom is appointed by the diocesan bishop. If the college has fewer than six or more than twelve members, it is not validly constituted.[151] This is a shift away from the 1917 Code, which allowed a lower limit of four consultors in smaller dioceses. To be eligible for appointment to the college of consultors, one must be a member of the presbyteral council at the time of appointment. If a member of the college ceases membership on the presbyteral council, he remains a member of the college of consultors until his term elapses on the college.[152]

[149] J. HANNON, *The College of Consultors and the Exercise of Ecclesial Authority*, JCD diss., Faculty of Canon Law, Saint Paul University, Ottawa, 1986, 263 (=HANNON, *The College of Consultors and the Exercise of Ecclesial Authority*).

[150] H.V. RELON, *Legislation on the College of Consultors: Evolution and Commentary on Some Aspects*, JCD diss., Rome, Ponticium Athenaeum Sanctae Crucis, 1996, 154 (=RELON, *Legislation on the College of Consultors*).

[151] Cf. RENKEN, *Particular Churches: Their Internal Ordering*, 139.

[152] Two authentic interpretations have clarified this position. These interpretations were proposed by the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law on 26 June 1984.

Q. Whether, according to the norm of canon 502, §1, a member of the college of consultors who ceases to be a member of the presbyteral council remains in his function as a consultor?

R. *Affirmative*.

Q. Whether during the period of five years, if one ceases to be a consultor, the diocesan bishop must name another in his place?

The diocesan bishop appoints members to the college, in accord with the canons that regulate the canonical provision of an ecclesiastical office (cc. 145-156). The term of office is five years, as opposed to three years in the 1917 Code. A consultor remains in office as a member of the college for his full five-year term, even after he has completed his term in the presbyteral council. Thus, c. 502, §1 provides for continuity, with no break in the existence of the college, so that notice of termination of office after five years must still given in writing by the diocesan bishop to the individual concerned.[153]

4.1.3 — *Functions*

The college of consultors is a collective group that assists the diocesan bishop in the governance of the diocese. The college of consultors is able to govern the diocese *sede vacante*, and it gives consent and counsel to the bishop in matters prescribed by the law. Thus, "[i]t is the only collective diocesan organ that has the capacity to perform all three functions: namely, active, consultative, and control. Within these three functions, the general law determines its specific juridic competencies to distinguish them from the other consultative organs in the diocese."[154]

The significant functions that the Code assigns to the college of consultors involve various aspects of central diocesan administration, particularly *sede vacante* and *sede impedita*. In these exceptional circumstances,[155] the functions of the college of consultors are outlined in cc. 421, §1, 883, 4°, 422, 419, 382, §2, 404, §1, 404, §3, 413, §3, and 501, §2. The Code identifies three instances wherein the diocesan bishop cannot perform a juridic act validly without obtaining the consent of the college of consultors (cc. 1277, 1292, §2, 1295). The diocesan administrator is required to obtain consent from the college of consultors in three instances specified in cc. 272 485, and 1018, §. The Code requires the diocesan bishop to receive counsel of the college of consultors in the instances found in cc. 494, §1, 494, §2 and 1277.

R. *Negative* and *ad mentem*. The mind [of the Legislator], however, is that the obligation to name another consultor exists only if the minimum number required in canon 502, §1 is lacking.

See PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CODE OF CANON LAW, *Responsa ad proposita dubia*, 11 July 1984, in *AAS*, 76 (1984), 747, English translation in RENKEN, *Particular Churches: Their Internal Ordering*, 139, footnote 41.

[153] HANNON, *The College of Consultors and the Exercise of Authority*, 272.

[154] RELON, *Legislation on the College of Consultors*, 158.

[155] The list of the exceptional circumstances is taken from RENKEN, *Particular Churches: Their Internal Ordering*, 141-142.

In addition to the above functions, c. 413, §2 requires the college of consultors to select a priest to govern the diocese *sede impedita*, if a coadjutor (where there is one) is also impeded and the list mentioned in c. 413, §1 is unavailable (c. 413, §2). Finally, in addition to the functions which belong to the college of consultors as a group, some members of the college as *individuals* are to be heard by the pontifical legate whenever a diocesan bishop or a coadjutor bishop is to be appointed (c. 377, §3).

4.1.4 — *Cessation*

Once created, the college of consultors remains in existence as a body for a period of five years, and it remains in existence even after that time until notification of its dissolution is given to its members in writing by the diocesan bishop, who would then constitute a new college. During its existence, the diocesan bishop must appoint a new member only if the departure of a member results in less than six members. The new member completes the unexpired term of the member who departed.[156] And, "nothing prevents the diocesan bishop from removing an individual member of the college of consultors in accord with the norms for removal from office (cc. 192-195). The law does not, however, permit the diocesan bishop to dissolve the college of consultors, as he can dissolve the presbyteral council (see c. 501, §3)."[157]

4.2 — Documents after the 1983 Code

The only document after the promulgation of the 1983 Code that addresses the college of consultors is *Apostolorum successores*. The only new aspect of *Apostolorum successores* is the statement that "the bishop should abstain from voting with the consultors when an opinion or consent is requested of the college."[158]

5 — *The Diocesan Pastoral Council*

The diocesan pastoral council is a consultative body in which presbyters, religious and laity serve on an equal footing for investigating and considering matters relating to pastoral activity. The diocesan pastoral council of the 1983

[156] Cf. RENKEN, *Particular Churches: Their Internal Ordering*, 140.
[157] Cf. ibid.
[158] *AS*, no. 183, 201.

Code has no antecedents. It is a new reality envisioned by Vatican II. *Christus Dominus*, no. 27, manifested the desire to institute in every diocese a special diocesan council to study the pastoral issues of the diocese and to draw practical conclusions that would orient the bishop. This was taken up by *Ecclesiae sanctae* and made into law.

5.1 — Post Conciliar Documents

Several post conciliar documents treat the diocesan pastoral council. The first of these is the decree of Pope Paul VI, *Ecclesiae sanctae*.

5.1.1 — *Ecclesiae sanctae*

Ecclesiae sanctae established a diocesan pastoral council as a canonical institute in a particular Church. It treated the pastoral council together with the presbyters' council in numbers 15-17. Whereas the presbyters' council was mandated by *Ecclesiae sanctae*, the diocesan pastoral council was simply recommended: "The pastoral council, which enjoys only a consultative voice, may be established in different ways…."[159] The document outlined the purpose of the pastoral council as examining and considering all that relates to pastoral work and offering practical conclusions on these matters, so that the life and activity of the people of God would be brought into greater conformity with the Gospel.

Paragraph two of number 16 stated that the pastoral council enjoys only a consultative vote. Although by its nature it is ordinarily permanent, it may be temporary as regards membership and activity, and it may exercise its function as occasion arises. It is the responsibility of the bishop to convene it whenever he considers it advisable. Those who can be members include clerics, religious and laity, appointed freely by the bishop.[160] The only person whose membership was required on the diocesan pastoral council was the priest in charge of promoting missionary activity.[161] In addition to the broad mandate to investigate and offer practical conclusions regarding pastoral activities,[162] the pastoral council in mission countries was to prepare for and implement the actions of the diocesan synod.[163]

[159] *ES* I, no. 16, §2, in *AAS*, 58 (1966), 766, in *FLANNERYI*, 601.
[160] Cf. *ES* I, no. 16, §3, in *AAS*, 58 (1966), 766, in *FLANNERYI*, 601.
[161] Cf. *ES* III, no. 4, in *AAS*, 58 (1966), 783.
[162] Cf. *ES* I, no. 16, §1, 766.
[163] Cf. *ES* III, no. 20, 787.

5.2.2 — *Omnes christifideles* and *Ecclesiae imago*

The Directory was preceded by the circular letter *Omnes christifideles* from the Congregation for the Clergy.[164] The letter was addressed to bishops all over the world and further defined further the teaching and principles contained in *CD* 27 and *ES* I, 16-17 on the diocesan pastoral council. The letter discussed five areas pertaining to the pastoral council: the character of the pastoral council, its competence, the convocation and duration of the council and other councils similar to the pastoral council.

The letter reiterated the nature and purpose of the pastoral council, using the words of *Ecclesiae sanctae* and the 1971 Synod of Bishops.

> The pastoral council, in which the clergy, religious and laity who are chosen to take part, is to offer after study and consideration, its conclusions as to what is necessary for the diocesan community to organize the pastoral work and to execute it efficiently. The more important it daily becomes for bishops and presbyters to cooperate in their mutual responsibility, especially through the Presbyters' Council, the more desirable it is that in each diocese a pastoral council be established.[165]

As regards membership, the pastoral council should be composed of diocesan clergy, religious, and laity truly representative of the entire diocese, taking into consideration the different regions, social conditions, and professions, as well as the parts individuals and associations have in the apostolate. All members should be in full communion with the Catholic Church, and most of them should be lay people. The number of people on the pastoral council should not be too great, so that it may effectively carry out its work. Although the pastoral council has only a consultative vote, the bishop should greatly esteem its suggestions and proposals and seriously consider the judgements on which they agree.[166]

Number 9 speaks of issues to be treated by the pastoral council, as well as issues not to be treated by the council. Issues proper to the council include the missionary, catechetical, and apostolic undertakings within the diocese; the doctrinal formation and sacramental life of the faithful; pastoral activities to help presbyters in different social and territorial areas of the diocese; and public opinion on matters pertaining to the Church in the present time. Questions not to be treated by the pastoral council are general

[164] SACRED CONGREGATION FOR THE CLERGY, Circular Letter on Pastoral Councils *Omnes christifideles*, 25 January 1973, in *EV*, vol. 3, 1196-1211, in *CLD*, vol. 8, 280-288.
[165] *OC*, no. 4, in *CLD*, vol. 8, 283.
[166] *OC*, no. 8, in *CLD*, vol. 8, 285.

questions bearing on faith, orthodoxy, moral principles and laws of the universal Church.[167]

As regards convocation, the letter repeats that it is the diocesan bishop's right to convene the pastoral council according to diocesan needs, adding that the bishop himself, or his delegate, is to preside over the council. When the see is vacant, the pastoral council ceases to exist; however, the diocesan administrator may still seek the advice of the members of the council as individuals or in small groups.[168] Number 12 of the letter states that it is not yet opportune to have pastoral councils on inter-diocesan, provincial, national or international levels.[169]

Ecclesiae imago, issued the same year as *Omnes christifideles*, included further directives that would affect the development of the diocesan pastoral council. At no. 204, the Directory speaks of the pastoral council as highly recommended, although not mandatory. It restates the nature and purpose of the pastoral council.

> The pastoral council is a body set up to investigate and carefully consider whatever pertains to diocesan pastoral activities and to arrive at practical conclusions to help the people of God pattern their lives and actions more closely on the Gospel (CD 27; ES 1, 16). By its study and reflection, the council furnishes the judgements necessary to enable the diocesan community to plan its pastoral programme systematically and to fulfill it effectively.[170]

The pastoral council has only a consultative vote, but the bishop should greatly respect its recommendations, since they offer him the serious and settled cooperation of the ecclesiastical community.[171]

The pastoral council is to be made up of clergy, religious and laity, specifically chosen by the bishop. To make the council's work more effective, the bishop can order parish pastoral councils to be set up and aligned to the diocesan pastoral council. These parish pastoral councils, grouped together according to areas, could choose representatives to serve on the diocesan council, so that the whole diocesan community may feel that it is offering its cooperation to its bishop through the diocesan council.[172]

So that the council may actually achieve this goal of cooperation with the bishop on the pastoral life of the diocese, it is important that a study precede

[167] *OC*, no. 9, 286, in *CLD*, vol. 8, 285.
[168] Ibid., no. 11, 286, in *CLD*, vol. 8, 287.
[169] Ibid., no. 12, 287-288.
[170] *EI*, no. 204, 201, in Directory (1973), 105.
[171] *EI*, no. 204, 202, in Directory (1973), 105.
[172] Ibid.

their common deliberation; "and if the case warrants, the help of institutes or offices that work in the field may be used (*ES* I, 16; III, 4), as for example, the office for socio-religious activities, the office for the means of social communication, etc."[173]

5.3 — The 1983 Code of Canon Law

In the 1983 Code, the diocesan pastoral council is treated in cc. 511-514. The Code does not require the diocesan bishop to establish a diocesan pastoral council, but it recommends it to the extent that pastoral circumstances suggest it.[174] The purpose of the diocesan pastoral council is (1) to investigate those matters which pertain to diocesan pastoral works, (2) to study them, and (3) to propose practical conclusions about them. The difference between the diocesan pastoral council and the presbyteral council is that, whereas the diocesan pastoral council focuses on "pastoral" works, the focus of the presbyteral council is upon diocesan "governance" issues (see 495, §1).[175] William Woestman says that "the theological foundations for the diocesan pastoral council are *communio* and the participation of the faithful in the pastoral activity of the Church. Both communion and participation are rights and duties of all the faithful in virtue of their baptism incorporating them in Christ and the Church."[176]

5.3.1 — *Nature and Purpose*

Canon 511 states that, in every diocese, to the extent that pastoral circumstances suggest it, a pastoral council is to be constituted which, under

[173] *EI*, no. 204, 202.

[174] While the pastoral council is not obligatory for dioceses according to c. 511, it is required for personal ordinariates for former Anglicans. *Anglicanorum coetibus*, art. X §4, states: "In order to provide for the consultation of the faithful, a pastoral council is to be constituted in the ordinariates [Cf. canon 511]." The Complementary Norms to *Anglicanorum coetibus* issued by the Congregation for the Doctrine of the Faith elaborated on the aforementioned point: "Article 13, §1. "The pastoral council, constituted by the ordinary, offers advice regarding the pastoral activity of the ordinariate. §2. The pastoral council, whose president is the ordinary, is governed by statutes approved by the ordinary." See CDF, Complementary Norms for the Apostolic Constitution *Anglicanorum coetibus*, 4 November 2009, English edition in *Origins*, 39 (2009-2010), 390-392, art. 13. See also RENKEN, *Particular Churches: Their Internal Ordering*, 160.

[175] Cf. RENKEN, *Particular Churches: Their Internal Ordering*, 159.

[176] W.H. WOESTMAN, *Diocesan Consultative Organisms*, Class notes, DCA 5201, Ottawa, Faculty of Canon Law, St. Paul University, 1995-1996, 29.

the authority of the bishop, investigates, considers, and proposes practical conclusions about those things which pertain to pastoral works in the diocese (c. 511). From this canon, we deduce that the diocesan pastoral council is not mandatory. The diocesan bishop establishes it if he determines that the concrete situation requires it. Unlike the presbyteral council, which assists the bishop in the governance of the diocese, the diocesan pastoral council is founded to assist the bishop through its study and weighing of pastoral matters and through its proposing concrete practical conclusions.[177]

The purpose of the diocesan pastoral council is threefold: investigating pastoral issues under the authority of the bishop, pondering them and suggesting practical conclusions about them.

> The pastoral council, therefore, can give the bishop great help by presenting him with proposals and suggestions: regarding missionary, catechetical and apostolic undertakings within the diocese; concerning the promotion of doctrinal formation and sacramental life of the faithful; concerning pastoral activities to help presbyters in the various social and territorial areas of the diocese; concerning public opinion on matters pertaining to the Church as it is more likely to be fostered in the present time; etc. The pastoral council can be also extremely useful for mutual communication of experiences and for proposed undertakings of various types by which the concrete needs of the people of the diocese may become clearer to the bishop and a more opportune means of pastoral action may be suggested to him.[178]

5.3.2 — *Composition*

The Code gives general criteria for membership in the pastoral council, but it belongs to the diocesan bishop to determine the precise way of choosing the members as established in the statutes. Canon 512, §1 requires that all members of the pastoral council be in full communion with the Catholic Church. Canon 205 gives the elements of full communion as baptism, union with Christ in visible community and the bonds of faith, sacraments, and ecclesiastical governance (c. 205). The membership of the diocesan pastoral council must include lay people, members of institutes of consecrated life and clerics, all in full communion with the Church. The number of members of the pastoral council is determined by the diocesan bishop in the statutes. The number should be large enough to be truly representative of the faithful of the diocese, but not so large as to make it difficult to conduct fruitful meetings.

[177] R. PAGÉ, *The Diocesan Pastoral Council*, trans. by Bernard A. Prince, Paramus, NJ, The Newman Press, 1970, 65.

[178] *Omnes christifideles*, no. 9, in *CLD*, vol. 8, 286-287.

The second paragraph of c. 512 highlights the representative character of the pastoral council. The council is meant to be representative of the whole people of God, without the members being considered necessarily as representatives of a specific constituency. Thus, each member of the council should have the same sense of being a servant of the entire diocese which makes the pastoral council truly an organisation of collective responsibility of all the active elements of the people of God in a particular Church.[179] The members must be outstanding in firm faith, good morals and prudence (c. 512, §3), since the pastoral council plays an important role in the life of the diocese.

5.3.3 — *Functions*

The pastoral council exists to do pastoral planning. To do this most efficiently and effectively, John Renken says:

> The Church will wisely rely on the experience and expertise of professional planners who assist in discerning needs, gathering data, developing workable solutions, cost factoring, designing means of implementation, periodic reviewing, developing leadership skills, and so forth …. The pastoral council will give leadership informed recommendations on how to meet pastoral needs. These recommendations will ordinarily indicate a means of implementation to involve some other agent. The council normally does not implement its own recommendations, but continues to do planning for the community.[180]

Thus, the pastoral council can present to the diocesan bishop proposals and suggestions regarding pastoral issues like missionary activity of the diocese, catechetical and apostolic undertakings, the promotion of doctrinal formation, the sacramental life of the faithful, etc.

The diocesan pastoral council possesses a consultative vote. Therefore, the pastoral council "offers recommendations to the community leader, who appreciates the council's identification and study of the people's needs. The leader retains, however, the necessary freedom to address these needs in some way other than the council's recommendation, though he is aware of the repeated invitation of the post-conciliar documents that informed advice is not to be dismissed easily or to be disregarded easily."[181] The result of the work of the pastoral council is in the form of information, suggestions and proposals presented to the bishop, to whom it belongs to evaluate

[179] Cf. F. Loza, "The Diocesan Pastoral Council," in *Exegetical Comm*, II/2, 1248.

[180] J.A. Renken, "Pastoral Councils: Pastoral Planning and Dialogue among the People of God," in *The Jurist*, 53 (1993), 147 (=Renken, "Pastoral Councils").

[181] Renken, "Pastoral Councils," 153.

the conclusions of the pastoral council and to do with them that which he deems appropriate.[182]

Besides the above functions, the diocesan pastoral council is to choose two of its members to take part in a particular council, where they have a consultative vote (c. 443, §5). Furthermore, the diocesan bishop is to determine the manner whereby the diocesan pastoral council chooses lay persons, even members of institutes of consecrated life, to take part in the diocesan synod, and the number of those chosen; if there is no diocesan pastoral council, the diocesan bishop is to determine another method to select lay members of the diocesan synod (c. 463, §1, 5°).

5.3.4 — *Cessation*

The diocesan pastoral council is ordinarily a permanent institution, but it is temporary in terms of its membership and activity. "The pastoral council is constituted for a period of time" (c. 513, §1), at the discretion of the diocesan bishop, when concrete circumstances demand it. Thus, in initiating a pastoral council, the first step is gathering information about the pastoral circumstances that would justify the establishment of the council. The next step is appointment of the members and writing of the statutes, which the diocesan bishop must approve. The last step is for the bishop to decide whether to dissolve the pastoral council or to let it exist and replace new members when older members' terms come to an end.

As the presbyteral council ceases when the see is vacant, similarly the pastoral council also ceases with the vacancy of the see (c. 512, §2). The diocesan administrator, however, can call upon the former members of the defunct council for their advice, if he judges this opportune.[183] It is the prerogative of the new diocesan bishop to reconstitute the former pastoral council or to establish a new pastoral council. He may retain the old statutes or make new ones.[184]

5.4 — Documents after the 1983 Code

The documents that treat the diocesan pastoral council include *Christifideles laici*, *Ecclesiae de mysterio* and *Apostolorum successores*. *Christifideles laici* is on the vocation and mission of the lay faithful in the Church

[182] ARRIETA, *Governance Structures within the Catholic Church*, 244.
[183] *Omnes christifideles*, no. 11, in *CLD*, vol. 8, 287.
[184] Cf. F. LOZA, "The Pastoral Council," in *Exegetical Comm*, II/2, 1250.

and in the world.[185] *Christifideles laici* asserts that, "in fact, on a diocesan level this structure could be the principal form of collaboration, dialogue, and discernment as well. The participation of the lay faithful in this council can broaden resources in consultation and the principle of collaboration – and in certain instances also in decision-making – if applied in a broad and determined manner."[186]

Unlike *Christifideles laici* and *Apostolorum successores*, *Ecclesiae de mysterio* has a negative tone. In just three lines, *Ecclesiae de mysterio* says of the diocesan pastoral council: "Diocesan and parochial pastoral councils, and parochial finance councils, of which non-ordained faithful are members, enjoy a consultative vote only and cannot in any way become deliberative structures."[187]

In expounding on the nature and functions of the diocesan pastoral council, *Apostolorum successores* adds more areas for the diocesan pastoral council to explore. The areas include: "pastoral planning, various catechetical, missionary and apostolic initiatives, ways of improving the doctrinal formation and sacramental life of the faithful, assistance for the pastoral ministry of the clergy, and various means of raising public awareness regarding concerns of the Church."[188]

Conclusion

The participative structures in the 1983 Code have evolved over time. The laws regarding their establishment and existence have been influenced by prevailing social, cultural, political, economic, and religious conditions. Notably, the 1983 Code shifts away from "perfect society" ecclesiology and embraces *communio* ecclesiology. It draws on juridical norms of the 1917 Code and the conciliar and post conciliar documents for a comprehensive treatment of the structures of participation. It expands the participative

[185] For more details, see LUSABE, *An Analysis of Selected Participative Structures in a Particular Church*, 246-248.

[186] JOHN PAUL II Post-synodal Apostolic Exhortation on the Vocation and Mission of the Lay Faithful in the Church and in the World *Christifideles laici*, 30 December 1988 (*CL*), no. 25, in *AAS*, 81 (1989), 437, English translation in *Origins*, 18 (1989), 573.

[187] CONGREGATION FOR THE CLERGY et al., Instruction on Certain Questions regarding the Collaboration of the Non-Ordained Faithful in the Ministry of Priests *Ecclesia de mysterio*, 15 August 1997 (*EM*), art. 5, §2, in *AAS*, 89 (1997), 868, English translation in *Origins*, 27 (1997), 405.

[188] *AS*, no. 184, 203.

structures in a particular Church from just a few in the 1917 Code (the diocesan synod, the council of administration, the cathedral chapter, and the consultors) to several in the 1983 Code (the diocesan synod, the diocesan finance council, the episcopal council, the presbyteral council, the college of consultors, the diocesan pastoral council, the parish finance council, and the parish pastoral council).

Every legal system is conditioned historically, culturally, socially and politically.[189] Thus, it is impossible to formulate laws that are always clear and responsive to pastoral contingences. It is for this reason that the treatment of these participative structures in the 1983 Code and following is not exhaustive. There is constant need to update the law to meet the needs of the time.

[189] T.J. GREEN, "Selected Legislative Structures in Service of Ecclesial Reforms," 422.

Studia canonica 52 | 2018, 205-222
doi: 10.2143/STC.52.1.3285218

« *AMORIS LAETITIA* » ET LA NOTION DE GRADUALITÉ : LA DOCTRINE CANONIQUE EN FAVEUR DE LA LOGIQUE D'INTÉGRATION

EMMANUEL PETIT*

RÉSUMÉ — Dans la récente exhortation apostolique *Amoris laetitia*, le pape François appelle à un discernement pastoral à propos des situations matrimoniales délicates. Si l'exhortation ne propose pas une nouvelle législation, elle nous invite cependant à redécouvrir certains aspects du droit de l'Église. Les notions de gradualité et d'intégration structurent la doctrine canonique. Des institutions, déjà anciennes, comme la légitimité par mariage subséquent ou la convalidation radicale du mariage, attestent la volonté du droit d'aider les conjoints à cheminer dans leur vocation d'époux chrétiens. Le droit de l'Église est ordonné au salut des âmes. Il doit accompagner les situations personnelles et témoigner de l'indissolubilité comme don de Dieu.

SUMMARY — In the recent apostolic exhortation *Amoris laetitia*, Pope Francis calls for pastoral discernment about delicate matrimonial situations. If the exhortation does not propose new legislation, it invites us nevertheless to rediscover some aspects of the law of the Church. The notions of gradualness and integration structure the canonical doctrine. Some institutions, already old, such as the legitimacy of subsequent marriage or the radical convalidation of marriage, attest to the will of the law to help spouses to walk in their vocation as Christian spouses. The law of the Church is ordered to the salvation of souls. It must accompany personal situations and bear witness to indissolubility as a gift from God.

* Vicaire judiciaire adjoint de Paris. Professeur extraordinaire à la faculté de théologie du Collège des Bernardins. Chargé d'enseignement à la faculté de droit canonique de l'Institut catholique de Paris.

Introduction

Dans son exhortation apostolique *Amoris laetitia*, publiée le 19 mars 2016, à l'occasion du jubilé de la Miséricorde, le pape François propose un long commentaire du chapitre 13 de la première Lettre aux Corinthiens (n. 90-119). Si ce passage de l'épître paulinienne est fréquemment lu à l'occasion de la liturgie du mariage, il est peu cité par le magistère. Le pape François présente ainsi l'amour conjugal et familial comme un cheminement au cours duquel se construit la vocation de l'homme. Cette notion traverse toute l'exhortation. On la retrouve aussi au chapitre VIII, à propos des situations pastorales délicates. Parce que l'homme est en chemin, le pape appelle à un juste discernement des situations particulières. Le pape privilégie la voie d'un discernement pastoral, plutôt que l'élaboration d'une 'législation générale du genre canonique' (n. 300). Cette formule pourrait paraître défavorable au droit canonique. Au contraire, nous voulons montrer que la doctrine canonique suggère elle-même ce discernement. Le droit de l'Église, bien loin d'enfermer toute chose dans des normes juridiques étroites, est tout entier orienté vers le bien pastoral de la personne : le salut des âmes est la loi suprême dans l'Église, rappelle l'ultime canon du code de 1983. Le droit canonique comporte en lui-même cette capacité au discernement et tient compte du cheminement individuel de l'homme.

Nous étudierons ici tout particulièrement deux notions mises en exergue par le pape François. Reprise de l'enseignement moral, celle de la gradualité exprime le fait que l'homme avance vers le bien par étapes. Elle s'articule avec la notion plus globale d'intégration, très honorée par le texte. Ces deux notions sont des critères indispensables au bon discernement pastoral. Nous verrons comment le droit de l'Église accompagne vers le sacrement de mariage. La finalité du droit est d'aider les personnes à réaliser leur vocation au mariage, selon le cheminement de chacun. Nous le verrons notamment à travers les deux exemples très éloquents du mariage subséquent et de la convalidation du mariage. Il s'agit ainsi de faire entrer les futurs époux dans le projet de Dieu, découvrant notamment la signification de l'indissolubilité, comme don de Dieu, et d'accompagner avec discernement et délicatesse toutes les situations personnelles.

1 — *Un droit de la grâce : « accompagner vers le sacrement de mariage »*

Deux institutions canoniques déjà anciennes, la légitimité par mariage subséquent et la *sanatio in radice*, dilatent les effets du mariage. Elles

expriment une des significations de la sacramentalité du mariage qui, à l'instar du baptême, est un instrument de la grâce. Elles manifestent que le droit de l'Église aide les époux, au-delà des vicissitudes, à accomplir leur vocation et à entrer dans le dessein de Dieu.

1.1 — Premier exemple d'intégration : la doctrine du mariage subséquent

Le XII^e^ siècle voit apparaître une nouvelle notion en droit matrimonial. Avec la redécouverte du droit romain, le droit canonique devient plus technique. Il se sert de cette technicité nouvelle pour affiner ses propres notions. L'époque est très marquée par la question de la légitimité des enfants : seul est légitime l'enfant né d'un mariage légitime. Pour répondre à la question des nombreuses naissances ou conceptions en dehors du mariage, le droit affirme que les enfants nés, ou conçus, avant le mariage sont légitimes une fois le mariage célébré, comme s'ils étaient nés du mariage. C'est ce que l'on nomme doctrine du mariage subséquent, qui raisonne par fiction[1] : le droit tort la réalité des faits pour donner aux enfants un statut auquel ils n'auraient *a priori* pas droit. Cette idée de légitimation par mariage subséquent repose notamment sur une décrétale d'Alexandre III qui commence ainsi : « la force du mariage est si grande que ceux qui sont nés avant sont tenus pour légitimes une fois le mariage contracté »[2]. La formulation même de la décrétale est significative : *Tanta est vis matrimonii*. Le pape s'appuie donc sur la force du mariage, en tant que sacrement, pour lui faire produire des effets exorbitants au regard de la stricte logique juridique qui veut que soient pleinement légitimes les seuls enfants nés du mariage légitime. Certes, puisque la légitimité correspond à un

[1] Le concept de fiction du droit (*fictio iuris*) apparaît en droit canonique au XIV^e^ siècle. Théorisée par le jurisconsulte pérugin Bartole, elle est adoptée avec engouement par les canonistes, dans un contexte de redécouverte du droit romain. Elle disparaît des raisonnements canoniques au siècle suivant, pour réapparaître au XVII^e^ siècle, époque d'un certain renouveau canonique, marqué par la Contre-Réforme et le développement des missions. La notion est alors très présente chez les auteurs, mais aussi dans la jurisprudence de la Rote romaine. Elle disparaît à nouveau au siècle suivant avant d'être redécouverte à la fin du XIX^e^ siècle et au début du XX^e^ siècle, dans le contexte de la codification et de la réforme des institutions de l'Église. Cet instrument juridique est donc toujours sollicité dans les périodes fastes de l'histoire canonique. Elle donne souvent aux canonistes les moyens de sortir de raisonnements juridiques trop étroits, se rappelant toujours que le droit de l'Église est pleinement ordonné au bien des âmes. Sur la question, notamment en droit matrimonial, on peut se reporter à E. PETIT, *Consentement matrimonial et fiction du droit*, Rome, Editrice Pontificia Università Gregoriana, 2010.

[2] X 4, 17, 6 : *Tanta est vis matrimonii, ut qui antea sunt geniti post contractum matrimonium legitimi habeantur*.

statut juridique, il est toujours possible de légitimer un enfant. Mais le statut d'enfant légitimé reste toujours inférieur à celui de l'enfant pleinement légitime. Ici, le droit ne légitime pas : il fait comme si l'enfant avait toujours été légitime. D'une certaine manière, le droit réécrit l'histoire. Au-delà de l'artifice juridique, la fiction permet de décrire juridiquement un effet qui procède quant à lui de la sacramentalité : le mariage rétroagit dans ses effets. La force se rattache en effet à l'idée de sacrement, comme l'exprime une formule similaire présente sous la plume de Gratien : *Tanta vis est in sacramento conjugii*[3]. Certes, le mot 'sacramentum' n'est pas à entendre à l'époque dans l'acception rigoureuse qu'il a prise par la suite. Néanmoins, cette formule exprime un lien entre la force des effets et le sacrement. Paraphrase de saint Augustin à propos du baptême, *tanta vis est in sacramento simplicis baptismi*[4], elle exprime ainsi une certaine analogie entre le baptême qui efface les péchés de la vie passée et le mariage qui assume la vie antérieure du couple.

Le sens de la doctrine du mariage subséquent est de favoriser le mariage. Cela fait écho à ce que le pape écrit en reprenant les mots de la *relatio finalis* du synode : « quand l'union atteint une stabilité visible à travers un lien public – et qu'elle est caractérisée par une profonde affection, par une responsabilité vis-à-vis des enfants, par la capacité de surmonter les épreuves – elle peut être comme une occasion d'accompagner vers le sacrement de mariage, lorsque cela est possible »[5]. Cela rejoint une préoccupation profonde du droit, qui est bien d'accompagner des couples vers le mariage, affirmant que cela reste toujours possible, non seulement au regard du présent, mais aussi du passé. Le droit, en rétroagissant dans ses effets, donne à l'histoire du couple une dimension nouvelle, à la lumière de l'Évangile. Une période de concubinage qui précède le mariage, même si cela ne correspond pas à ce que l'Église entend favoriser par son enseignement, est recouverte par la légitimité du mariage subséquent. Le droit n'insiste donc pas sur des oppositions, par exemple entre concubinage et mariage, mais sur une possible progression dans le cheminement des personnes[6]. La mission du droit est de favoriser une évolution vers le mariage, en faisant bénéficier très largement toute la période antérieure des

[3] Décret de Gratien, *dictum post* d. 27, c. 1 : « la force dans le sacrement du mariage est si grande que le mariage lui-même ne peut être dissout par la violation du vœu ».

[4] La formule augustinienne évoque le caractère imprimé par le baptême : « il y a une telle force dans le sacrement du simple baptême que, lorsque nous reconnaissons qu'un baptisé se conduit mal et doit être purifié, nous interdisons cependant qu'il soit rebaptisé par la suite ». Saint Augustin, *De Baptismo contra donastistas*, livre VI, chap. 14, in *Œuvres complètes*, vol. 28, Paris 1872, 292.

[5] *AL* 78, *relatio finalis* 2015, n. 53-54.

[6] La notion de cheminement est importante dans l'exhortation. Le mot même apparaît une douzaine de fois. Les mots de la sémantique du chemin comptent soixante-six occurrences.

effets du mariage. Non seulement, les enfants nés du concubinage deviennent légitimes dès le départ, mais l'union sexuelle entre les futurs époux devient légitime elle-même par le mariage subséquent. Le droit accompagne vers la célébration du sacrement de mariage. Nous pourrions écrire la même chose à l'égard de catholiques qui sont mariés seulement civilement. En raison de la clause irritante de la forme canonique, ce mariage est invalide canoniquement[7]. Mais si le droit ne reconnaît pas la valeur de ce mariage seulement civil des catholiques, il entend favoriser l'évolution des conjoints vers le mariage sacramentel. Il est certes toujours possible de célébrer canoniquement un mariage. Puisque les effets du mariage rétroagissent, cela revient finalement à donner *a posteriori* au consentement civil des effets qu'il était incapable de produire. La célébration canonique du mariage n'est donc pas la négation du mariage civil antérieur, mais au contraire sa reconnaissance, puisque la célébration canonique revient en définitive à donner au consentement civil les pleins effets du mariage, y compris au plan canonique et sacramentel.

La doctrine du mariage subséquent a été quelque peu oubliée dans la tradition canonique récente. Le moindre intérêt porté à la question de la légitimité l'explique pour une part. Les cc. 1116 et 1117 du code de droit canonique de 1917 y font encore référence explicitement, mais elle est à peu près absente du code de 1983. Cela est regrettable, car elle est une des originalités les plus marquantes et les plus intéressantes du droit canonique matrimonial. Il nous semble que la récente exhortation apostolique redonne à cette doctrine une certaine actualité, non par rapport à la question de la légitimité des enfants, mais quant à la rétroactivité des effets du mariage. La doctrine canonique montre qu'elle se situe d'emblée au-delà d'une stricte rigueur juridique. La sacramentalité du mariage, sur laquelle repose cette rétroactivité des effets, déploie avec libéralité les effets du mariage. Nous voyons bien que nous ne pouvons pas enfermer les choses dans des frontières étroites, puisque le droit déborde la simple logique matérielle des faits. C'est l'instrument de la fiction juridique qui a permis aux hommes du moyen âge de défendre cette conception[8]. Il apparaît en outre que le droit n'ignore pas

[7] Cf. c. 1108 § 1 *CIC* 1983 : « Seuls sont valides les mariage contractés devant l'Ordinaire du lieu ou bien devant le curé, ou devant un prêtre ou un diacre délégué par l'un d'entre eux, qui assiste au mariage, ainsi que devant deux témoins […] ». Cette règle invalidante a été introduite par le fameux décret *Tametsi* du concile de Trente, en 1563, pour lutter contre le problème des mariages clandestins, importants à l'époque.

[8] Le jurisconsulte Alciat (1492-1550) emploie une image très pittoresque pour illustrer la fiction du droit, tirée de *l'Odyssée* d'Homère (V, 333). Alors qu'Ulysse, naufragé, est pris dans la furie des flots, la déesse Leucothée le sauve à l'aide d'un ruban magique. La fiction du droit serait ainsi un moyen pour sortir d'une situation difficile. Cf. A. ALCIAT, *Parergon iuris seu obiter dictorum*, in *Opera omnia*, IV, Bâle, 1632, col. 435.

le passé des conjoints, mais au contraire entend l'assumer, le plus positivement possible.

1.2 — Deuxième exemple d'intégration : la convalidation radicale du mariage

Lorsqu'un mariage est invalide, il est toujours envisageable de le convalider ultérieurement. Comme c'est le consentement qui fait le mariage, il convient de refaire un consentement qui aurait été absent ou vicié. Mais si le mariage est invalide pour une autre raison, plus périphérique, comme un empêchement ou un défaut de la forme canonique imposée par le droit, il est toujours possible de convalider le mariage, même sans refaire le consentement. On parle alors de convalidation radicale, ou *sanatio in radice* : le mariage est convalidé à la racine, c'est-à-dire en s'appuyant sur un consentement préalablement émis mais alors incapable de produire le mariage. Un exemple historique marquant de *sanatio in radice* est celui de la France après la période révolutionnaire. Alors que le culte a été pleinement rétabli par le concordat, pour régulariser toutes les situations de la période révolutionnaire, le pape Pie VII procède à une convalidation de tous les mariages religieux célébrés en France après la constitution civile du clergé[9].

Cette institution de la *sanatio in radice*, montre tout d'abord un intérêt pratique évident. Elle illustre bien la souplesse du droit canonique, qui recherche d'abord le bien des personnes. Prenons ainsi l'exemple d'une personne catholique mariée seulement civilement avec quelqu'un qui n'est pas baptisé. Après un certain temps, alors même que le mariage paraît solide, la personne souhaite que son mariage puisse être reconnu par l'Église. Une solution possible est de célébrer un mariage à l'Église. Mais il peut exister de légitimes réticences à réitérer un consentement que l'on a déjà donné et que l'on considère comme définitif, notamment de la part de la personne non baptisée. Il est alors possible de donner au mariage civil des effets canoniques : en s'appuyant sur le consentement déjà émis, et en donnant les dispenses nécessaires, l'Église reconnaît a posteriori ce mariage. Comme dans le cas du mariage subséquent, les effets du mariage rétroagissent et donnent aux époux et aux enfants un statut de pleine légitimité dès le départ. Il est même possible de convalider le mariage civil de deux catholiques, sans réitération du consentement, dans le cas où l'un des deux époux refuserait

[9] Cf. J.-B. CAPRARA, Instruction *De matrimoniorum irritorum revalidatione*, 26 mai 1803, publiée in J. CARRIÈRE, *Dissertation sur la réhabilitation des mariages nuls où l'on traite en particulier des dispenses in radice*, Paris 1834, appendice III, 110-115.

cette réitération. Il s'agit bien alors de s'appuyer sur le consentement préalablement émis devant le magistrat civil.

Mais au-delà de cet aspect technique, la *sanatio in radice* montre surtout le rapport complexe qui existe entre consentement et mariage. La convalidation du mariage n'a pas seulement un intérêt pratique, pour satisfaire une rigueur juridique. Sa possibilité montre une volonté d'accompagner les personnes vers un mariage plein et authentique. La validité d'un mariage n'est donc pas une réalité nécessairement immédiate. Il faut parfois du temps. Mais l'invalidité n'est pas non plus irrémédiable. Comme une vie conjugale se construit, la validité d'un mariage est elle-même une œuvre en construction. Le droit accompagne cette construction. Le droit ecclésial fonctionne ainsi à l'instar du baptême. Il sauve et régénère les situations difficiles. Certains auteurs décrivent une dimension palingénésique du droit[10]. La palingénésie est un terme grec employé pour évoquer la régénération baptismale. Le mariage est sauvé de l'invalidité dont il souffre et dégagé de tout empêchement, de la même manière que l'homme est sauvé du péché par le bain du baptême.

L'exhortation apostolique avance la notion de « gradualité dans la pastorale »[11]. Cette notion évoque un progrès possible accompli par le couple. Alors que certains couples ont choisi le mariage seulement civil, voire la simple cohabitation, leur union peut se construire dans le temps, acquérant ainsi la « capacité de surmonter les épreuves ». Ces situations appellent un accompagnement possible vers le mariage : « toutes ces situations doivent être affrontées d'une manière constructive, en cherchant à les transformer en occasions de cheminement vers la plénitude du mariage et de la famille à la lumière de l'Évangile. Il s'agit de les accueillir et de les accompagner avec patience et délicatesse »[12]. Le pape prend l'exemple de la Samaritaine pour illustrer cet accompagnement. Le Christ « a adressé une parole à son désir

[10] Cf. par exemple le jurisconsulte dijonnais C. FÉVRET, *Traité de l'abus*, l. 5, chap. 3, Lyon, 1689, 4e édition, 49-50, nt s.

[11] *AL* 293. Le pape reprend une notion de l'enseignement moral. Il écrit au n. 295 : « Saint Jean-Paul II proposait ce qu'on appelle la 'loi de gradualité', conscient que l'être humain 'connaît, aime et accomplit le bien moral en suivant les étapes d'une croissance'. Ce n'est pas une 'gradualité de la loi', mais une gradualité dans l'accomplissement prudent des actes libres de la part de sujets qui ne sont dans des conditions ni de comprendre, ni de valoriser, ni d'observer pleinement les exigences objectives de la loi ». Cette introduction de la notion de gradualité dans le domaine de la pastorale semble pertinente aussi au domaine juridique. Si la loi fixe une norme, elle sait aussi donner les moyens d'y parvenir. Il existe une souplesse de la loi qui, loin de renoncer par laxisme, tente de conduire l'homme vers le bien désigné.

[12] *AL* 294, *Relatio synodi* 2014, n. 43.

d'un amour vrai, pour la libérer de tout ce qui obscurcissait sa vie et la conduire à la joie pleine de l'Évangile »[13].

Le pape emploie aussi l'expression nouvelle de « seconde union consolidée dans le temps »[14]. Il fait ici référence à la situation de personnes divorcées, engagées dans une nouvelle union. Or, si cette dernière est confrontée à une question de légitimité, en raison du lien précédent, elle acquiert néanmoins, avec le temps, une valeur réelle. Cela rejoint aussi la question du consentement qui a été émis par des personnes divorcées. La doctrine de la *sanatio in radice* nous montre que le consentement émis par des personnes divorcées, habituellement au cours d'une cérémonie civile, n'est pas sans valeur sur le plan canonique. Même s'il n'existe pas de mariage sur le plan canonique, il y a néanmoins un vrai consentement. Il est ainsi possible de s'appuyer sur ce consentement pour lui faire produire des effets au plan canonique. Il s'agit alors d'une convalidation *in radice* d'un mariage qui a souffert d'un empêchement de droit divin, en l'occurrence de l'empêchement de lien[15]. Dès lors que l'on admet cette possibilité, cela signifie que le consentement initialement émis n'était pas inexistant. Bien plus, il est capable de produire des effets même dans l'ordre canonique. Le code de 1917 emploie l'expression de « consentement naturellement suffisant, mais juridiquement inefficace » (*consensus naturaliter sufficiens, sed iuridice*

[13] *AL* 294. Le terme même d'amour parcourt toute l'exhortation, puisque l'on ne compte pas moins de trois-cent soixante-quinze occurrences.

[14] *AL* 298. L'expression pourrait être rapprochée de l'expression traditionnelle en droit canonique de « secondes noces ». La question s'était déjà posée de la valeur des secondes noces, contractées après un veuvage. L'Église les a toujours considérées comme licites, mais on s'est posé la question de leur valeur sacramentelle. Même si les auteurs tranchent la question positivement, les secondes noces conservent longtemps un statut inférieur par rapport aux premières. Pietro Gasparri, qui a dirigé les travaux de la première codification, écrit au début des années 1930 : « La doctrine catholique est que les secondes et ultérieures noces (polygamie ou polyandrie successive) sont licites, mais en même temps elles sont moins honorables que les premières et que le chaste veuvage » (P. GASPARRI, *De matrimonio*, II, Rome 1932, n. 1068, 168). Jusqu'au code de 1917 inclus, la bénédiction nuptiale n'était donnée qu'une seule fois, à l'occasion du premier mariage. Cf. G. MOLLAT, « La bénédiction des secondes noces », in *Études d'histoire du droit canonique dédiées à G. Le Bras*, tome II, Paris 1965, 1337-1339: l'auteur montre cependant la faible application de la norme, notamment en Italie, cela malgré les dispositions de la décrétale « Capellanum » d'Alexandre III (X 4, 21, 1).

[15] Est-il possible de convalider *in radice* le mariage seulement civil de fidèles divorcés ? La question surgit de manière aigüe au moment de la première codification. Cela donnera lieu à un échange de lettres entre la commission de codification et le Saint-Office. Le code de 1917 laisse finalement ouverte cette possibilité, qui devient effective après la deuxième guerre mondiale. Sur cette question, cf. E. PETIT, *Consentement matrimonial et fiction du droit*, *op. cit.*, p. 230s.

inefficax)[16]. Non seulement, la doctrine canonique ne nie pas l'existence de ce consentement, mais elle admet la possibilité de lui faire produire des effets. Quelque chose qui est ignoré juridiquement n'est pas pour autant sans réalité. C'est bien le fondement de la formule utilisée par le pape : une réalité qui ne peut pas être reconnue par le droit n'est pas cependant sans consistance sur le plan humain. Le droit affirme avec d'autant plus de force l'invalidité de la nouvelle union qu'il est en vérité bien impuissant à empêcher le remariage de ceux qui sont déjà engagés dans une précédente union. En un sens, il ne le méconnaît pas complètement, comme le montre la notion de « consentement naturellement suffisant ». Telle est bien la difficulté, renforcée en France par la possibilité du mariage civil. La personne mariée reste capable d'un nouveau consentement matrimonial. Certes, c'est la fonction du droit de protéger l'indissolubilité[17] et de dissuader de contracter de nouvelles noces, en déclarant celles-ci non seulement illicites, mais invalides. Mais le droit admet cependant l'existence de ce nouveau consentement.

La gradualité est donc une notion tout à fait intégrée à la doctrine canonique, comme le montrent clairement les institutions du mariage subséquent et de la convalidation du mariage, et notamment la *sanatio in radice*. Le droit accompagne le cheminement de l'homme dans sa vocation matrimoniale. Cela ne se termine évidemment pas avec la célébration du mariage. Le pape écrit : « Aussi bien la préparation immédiate que l'accompagnement plus prolongé doivent assurer que les fiancés ne voient pas le mariage comme la fin du parcours »[18]. L'idée de gradualité annonce aussi celle d'intégration : le droit invite à avancer vers l'accomplissement de la vocation matrimoniale des baptisés. La notion d'intégration est très mise en avant par le pape François. Le mot apparaît une douzaine de fois dans l'exhortation, notamment

[16] Cf. c. 1139 § 1 *CIC* 1917. La jurisprudence de la rote romaine admet, dès les années quarante, que la connaissance d'empêchements n'est pas en soi un obstacle à l'émission d'un véritable consentement matrimonial (*coram* CANESTRI, 13 novembre 1943).

[17] Juridiquement, l'indissolubilité est protégée par l'empêchement de lien. Celui-ci est aujourd'hui énoncé au c. 1085 *CIC* 1983 qui dispose, dans son § 1 : « attente invalidement mariage la personne qui est tenue par le lien du mariage antérieur, même non consommé ». L'empêchement est bien une règle de droit en tant qu'il interdit de faire quelque chose qui en soi est faisable. Il est de droit divin, c'est-à-dire qu'il existe par lui-même et non en vertu de la loi canonique. L'Église ne fait donc que déclarer une règle qui existerait indépendamment du canon. L'empêchement étant de droit divin, il ne peut pas faire l'objet d'une dispense. Cette affirmation doit cependant être nuancée puisque l'Église accepte de dissoudre les mariages non sacramentels ou non consommés, qui sont pourtant par eux-mêmes indissolubles. L'empêchement ne fonctionne donc pas avec la même rigueur dans tous les cas.

[18] *AL* 211. Le pape écrit aussi par ailleurs : « certaines illusions sur un amour idyllique et parfait, privé ainsi de toute stimulation pour grandir, ne font pas de bien » (*AL* 135).

pour exprimer le sens du discernement pastoral. Le pape veut ainsi favoriser la « logique d'intégration »[19].

2 — *Entrer dans le projet de Dieu*

L'exhortation apostolique appelle à un discernement des situations personnelles, notamment les plus difficiles, favorisant une logique d'intégration. La loi suprême doit toujours rester le bien des âmes. Le droit de l'Église a ainsi connu une évolution à propos des personnes divorcées et remariées. Son propos n'est pas de sanctionner, mais d'aider l'homme dans la réalisation de sa vocation surnaturelle. Les époux sont appelés à découvrir la signification nouvelle de l'indissolubilité, qui se fonde dans le baptême des conjoints : l'engagement des époux se fortifie par la grâce sacramentelle.

2.1 — Accompagner les situations délicates

À propos des situations les plus délicates[20], le pape François cite son anté-prédécesseur, dans l'exhortation apostolique *Familiaris consortio* : « Face aux situations difficiles et aux familles blessées, il faut toujours rappeler un principe général : 'les pasteurs doivent savoir que, par amour de la vérité, ils ont l'obligation de bien discerner les diverses situations' (*Familiaris consortio*, n. 84) »[21]. Le pape François évoque la question des fidèles divorcés engagés dans une nouvelle union. Il souligne tout d'abord qu'il est important que ces derniers sentent qu'ils font partie de l'Église et « ne sont pas excommuniés ». Le pape souligne surtout leur appartenance à la communion ecclésiale. S'appuyant sur les relations des deux étapes du synode, il rejette toute idée de discrimination dont ces personnes pourraient souffrir

[19] Cf. *AL* 299. Le pape écrit à propos des Pères synodaux : « la logique de l'intégration est la clef de leur accompagnement pastoral ».

[20] Le pape François emploie quelques fois dans l'exhortation l'expression de situations 'irrégulières', mais toujours entre guillements. Il écrit au n. 305 : « un Pasteur ne peut se sentir satisfait en appliquant seulement les lois morales à ceux qui vivent des situations 'irrégulières', comme si elles étaient des pierres qui sont lancées à la vie des personnes. C'est le cas des cœurs fermés, qui se cachent ordinairement derrière les enseignements de l'Église 'pour s'asseoir sur la cathèdre de Moïse et juger, quelquefois avec supériorité et superficialité, les cas difficiles et les familles blessées' » (Discours à l'occasion de la clôture de la XIV[e] assemblée générale ordinaire du Synode des Évêques [24 octobre 2015], dans *L'Osservatore romano*, édition en langue française, 29 octobre 2015, 8).

[21] *AL* 79.

et demande un discernement attentif[22]. Le pape évoque aussi d'emblée la simplification des procédures de nullité du mariage, introduites par les deux lettres apostoliques *motu proprio* « Mitis Iudex » et « Mitis et misericors Iesus »[23]. La réforme insiste sur le rôle et la responsabilité personnelle de l'évêque et favorise une plus grande simplicité et une plus grande célérité de la procédure elle-même. La première étape de discernement consiste donc à vérifier judiciairement la validité du mariage. Pour cela, la réforme prévoit l'institution d'une enquête préliminaire, dans le cadre de la pastorale familiale, afin d'aider et d'éclairer les fidèles.

Le pape François appelle à favoriser la logique d'intégration sur la logique d'exclusion[24]. Il cite une de ses propres homélies : « deux logiques parcourent toute l'histoire de l'Église : exclure et réintégrer […]. La route de l'Église, depuis le Concile de Jérusalem, est toujours celle de Jésus : celle de la miséricorde et de l'intégration […]. La route de l'Église est celle de ne condamner personne éternellement »[25]. Ces deux logiques évoquées par le pape parcourent tout système juridique : la fonction du droit est en effet de favoriser l'intégration de l'individu dans le corps de l'institution et, aussi, de sanctionner celui qui transgresse les règles du corps social. Ce sont des questions qui traversent notamment le droit pénal. Le droit canonique est lui-même habité par ce débat. Sous l'empire du code de 1917, la situation des personnes divorcées et remariées civilement était assimilée à de la bigamie[26] et, aux termes du c. 2356, faisait encourir l'excommunication ou l'interdit

[22] Cf. *AL* 243 : « Il est important de faire en sorte que les personnes divorcées engagées dans une nouvelle union sentent qu'elles font partie de l'Église, qu'elles 'ne sont pas excommuniées' et qu'elles ne sont pas traitées comme telles, car elles sont inclues dans la communion ecclésiale ». Le pape renvoie à une catéchèse du 5 août 2015.

[23] *AL* 244. Cf. pour l'Église latine, lettre apostolique *motu proprio* « Mitis Iudex Dominus Iesus », 15 août 2015, dans *L'Osservatore romano*, 9 septembre 2015, 3-4 ; pour les Églises orientales catholiques, lettre apostolique *motu proprio* « Mitis et misericors Iesus », 15 août 2015, dans *L'Osservatore romano*, 9 septembre 2015, 5-6.

[24] *AL* 296 et 299.

[25] *AL* 296. Le pape François reprend la même idée en évoquant le discernement pastoral « qui tend toujours à comprendre, à pardonner, à accompagner, à attendre, et surtout à intégrer. C'est la logique qui doit prédominer dans l'Église (…) » (*AL* 312).

[26] La notion de bigamie est encore couramment employée à l'époque, puisque l'on désigne comme bigamie successive, juridiquement pleinement licite, la situation de celui qui a été marié plusieurs fois successivement. Cependant, la situation d'une personne divorcée engagée dans une seconde union n'est pas complètement assimilable à la bigamie simultanée puisque la séparation d'avec le premier conjoint précède toujours la nouvelle union. La notion est abandonnée avec le code de 1983. La notion de « seconde union consolidée dans le temps » (*AL* 298) invite à sortir de cette conception trop étroite de bigamie simultanée.

personnel[27]. Ces peines n'avaient cependant rien d'automatique. Il fallait d'abord, d'après le canon, une monition de l'évêque du lieu ou de son vicaire avant que soit portée, selon la gravité de la faute, l'une ou l'autre peine prévue. Dans les faits, ces peines n'étaient guère ou pas portées[28]. Elles étaient ainsi essentiellement symboliques. En outre, l'excommunication, en tant que peine, est d'abord une peine médicinale : elle entend favoriser le retour de celui qui s'est éloigné du chemin de l'Évangile[29]. L'excommunication

[27] L'origine de la peine n'est pas évidente à établir. La norme la plus ancienne citée par les Sources authentiques de Gasparri au canon 2356 est une décision du pape Nicolas Ier (858-867) concernant le Roi de Lotharingie Lothaire II (Décret de Gratien, C. 24, q. 3, c. 19). Ce dernier avait renvoyé sa femme Theutberge, qui ne pouvait pas lui donner de descendance, pour épouser sa maîtresse. Le pape indique que doit être excommunié celui qui est présumé avoir deux femmes en même temps. Une décision du concile d'Elvire, au début du IVe siècle, prive de la communion une femme croyante qui a renvoyé son mari adultère mais s'est remariée : elle ne recevra pas la communion du vivant du mari 'sauf si la maladie oblige de la lui donner' (Décret de Gratien, C. 32, q. 7, c. 8). Une décision du concile de Néocésarée, lui aussi au début du IVe siècle, impose une pénitence à qui a été engagé dans de multiples noces : 'mais sa bonne conduite et sa foi peuvent abréger la durée de cette pénitence' (Décret de Gratien, C. 32, q. 7, c. 9). Les peines sont donc assez floues, mal déterminées. Elles évoquent l'excommunication ou l'accès aux sacrements. Le code de 1917 ne dit plus explicitement que les personnes divorcées engagées dans une nouvelle union ne peuvent pas accéder aux sacrements. C'était pourtant ce qu'enseignait précédemment la doctrine canonique. Cf. F.-X. Wernz, *Ius decretalium*, t. VI, Prati, Giachetti, 1913, n. 392, p. 389. Cela demeure la doctrine communément enseignée sous l'empire du code de 1917, comme du code de 1983. Cf. Jean-Paul II, exhortation apostolique « Familiaris consortio », 22 novembre 1981, n. 84.

[28] Bien avant la codification, l'histoire a retenu quelques cas célèbres, mais assez isolés et anciens. Outre l'exemple déjà évoqué de Lothaire II de Lotharingie (835-869), on peut citer en France celui du roi Philippe Ier (1052-1108) qui avait répudié Berthe de Hollande pour épouser Bertrade de Montfort, elle-même mariée. L'excommunication est portée par le concile d'Autun en 1094. Cela n'empêche pas la continuation de la vie commune, malgré le repentir du roi. Un autre exemple célèbre est celui du roi Philippe II Auguste (1165-1223), excommunié en 1200 par le pape Innocent III en raison de son mariage avec Agnès de Méranie. Cela reste sans résultat. Les enfants de Philippe Auguste et d'Agnès sont finalement légitimés. Dans l'histoire, l'exemple le plus célèbre reste celui du roi d'Angleterre Henri VIII (1491-1547), excommunié en 1534 par le pape Clément VII après son mariage avec Anne Boleyn. Là encore, la peine n'a pas l'effet escompté. Sous l'empire du code de 1917, je n'ai trouvé aucun exemple. La peine d'excommunication, finalement peu efficace, était largement tombée en désuétude, devenant purement de principe.

[29] Wernz précise cependant que celui qui de bonne foi estime son mariage invalide et se remarie sans avoir attendu la sentence du juge ecclésiastique, ne commet pas le péché de bigamie. Il n'est donc pas bigame au for interne, mais seulement au for externe et, à ce titre, peut néanmoins encourir les peines ecclésiastiques. Cf. F.-X. Wernz, *Ius canonicum*, t. IV, Rome, Université grégorienne, 1954, n. 492, 580. Cette remarque est importante, car elle montre bien que les peines ecclésiastiques établies par le canon 2356 *CIC* 1917 ne constituent pas un jugement moral sur une situation, mais n'ont d'autre fin que de protéger juridiquement le mariage.

doit être levée dès lors que la transgression de la loi a cessé. Ce n'est donc pas une peine définitive : son caractère fort veut d'abord alerter les consciences et faire réagir ceux que la peine frappe[30]. Fréquemment, en droit canonique, ce type de peines n'est pas urgé. Loin de correspondre à une incurie du droit, cela est bien une manière d'appliquer un droit dont la fin n'est pas la préservation d'un ordre établi, mais la réalisation par l'homme de sa vocation surnaturelle[31]. La peine a un caractère médicinal. Il s'agit de faire prendre conscience à la personne de la situation qui est la sienne pour aider ou provoquer son retour. Contrairement à ce que le mot d'excommunication pourrait laisser croire, la logique d'intégration n'est pas étrangère à la peine. Mais elle n'est manifestement aujourd'hui plus efficace, ni comprise, ce qui explique sans doute son abandon par le code de 1983. Comme le rappelle le pape François dans la citation que nous avons faite plus haut, l'idée d'intégration n'est pas sans lien avec celle de miséricorde. Cette dernière notion, citée plus de trente fois, est centrale dans l'exhortation. La notion d'intégration fait écho à ce don de la miséricorde[32].

Comme l'énonce le dernier canon du code de droit canonique[33], la loi suprême est en effet le salut des âmes, la *salus animarum*[34]. Il s'agit tout

30 La peine, en matière judiciaire, peut comporter un caractère symbolique, manifestant ainsi la désapprobation du fait par l'autorité, sans volonté réelle de sanctionner. C'est le cas notamment pour les peines *latæ sententiæ*, peines automatiques, encourues par le seul fait de l'acte, sans qu'il soit besoin de porter une sentence. Le cas le plus flagrant est l'excommunication *latæ sententiæ* pour avortement. Outre les nombreuses circonstances qui font que l'on ne tombe pas sous le coup de la peine, cette dernière reste de toute façon généralement occulte. Elle peut être levée aisément au seul for interne, éventuellement par le confesseur. Il s'agit donc essentiellement d'une peine de conscience, qui rappelle la gravité de l'acte, mais sans avoir de conséquence réelle sur la vie sociale de la personne.

31 La pratique de ne pas urger l'application de la loi prend parfois en droit canonique le sens de dissimulation. Elle est ainsi définie : « la dissimulation consiste de la part de l'autorité ecclésiastique à s'abstenir d'attaquer un acte ou une situation répréhensible ; non seulement l'autorité paraît ignorer, mais elle veut ignorer une position dont elle ne peut empêcher l'existence ». Cf. C. Lefebvre, « La dissimulation et la dispense tacite », dans *Ephemerides Iuris canonici*, 3 (1947), 607.

32 La notion de « don » apparaît plus de soixante-fois dans l'exhortation. Il s'agit tant du don de soi des époux que des dons multiples de Dieu.

33 Cf. c. 1752. Le pape François fait référence à ce principe dans son récent *motu proprio* « mitis iudex » du 15 août 2015, sur la réforme des procédures de nullité du mariage. Il y écrit dans son préambule : « tout cela a toujours été fait en ayant comme guide la loi suprême du salut des âmes puisque l'Église, comme l'a enseigné avec sagesse le bienheureux Paul VI, est un dessein divin de la Trinité, et donc toutes ses institutions, toujours perfectibles, doivent tendre à communiquer la grâce divine et favoriser continuellement, selon les dons et la mission de chacun, le bien des fidèles, comme fin essentielle de l'Église ».

34 Cf. G. Le Bras, Ch. Lefebvre, J. Rambaud, *L'âge classique 1140-1378, Sources et théorie du droit*, in G. Le Bras (éd.), *Histoire du Droit et des Institutions de l'Église en Occident*,

d'abord d'écarter le *periculum animarum* : le danger pour les âmes. Le droit de l'Église doit donc conduire les fidèles sur un chemin sûr, à l'image du bon pasteur qui sait mener ses brebis. Le pape Innocent III l'explique bien, lorsque, au concile de Latran IV, il décide de réformer et de restreindre l'empêchement d'affinité et de consanguinité en matière matrimoniale. Ces questions de consanguinité, qui touchent à des questions anthropologiques profondes, sont très importantes à l'époque. Ce changement paraît surprenant aux contemporains : un mariage hier interdit et invalide en raison d'un lien de consanguinité est désormais possible. Le pape se justifie en se référant à la pédagogie divine.

> On ne saurait juger répréhensible le fait que les décrets des hommes sont susceptibles de varier selon la diversité des temps, notamment lorsqu'une nécessité impérieuse et évidente le réclame : Dieu lui-même, parmi les lois qu'il avait édictées dans l'Ancien Testament, en a modifié quelques-unes dans le Nouveau. L'interdiction de mariage au second ou au troisième degré d'affinité, et celle d'unir les enfants du second lit à la parenté du premier lit, suscites de nombreuses difficultés et engendrent parfois un danger pour les âmes[35].

Le bien des âmes est un principe constant en droit canonique. Il constitue une véritable règle herméneutique de la règle fixée par l'Église. Depuis 1983 et la nouvelle codification, la question du remariage des personnes divorcées a été retirée du domaine pénal. Le code n'en dit d'ailleurs rien explicitement[36]. On pourrait voir une forme de silence de la loi, que le pape François

t. VII, Paris 1965, 417 : « En effet, les institutions canoniques sont avant tout préoccupées non pas tant par les règles demandées par le bien de la société que par l'intérêt des âmes en faveur desquelles existe la société ecclésiastique. Il en découle que dans bien des cas le droit canonique renoncera à faire prévaloir les exigences d'ordre strictement juridique en faveur du bien particulier ». L'adage canonique *salus animarum, suprema lex* peut être rapproché de l'adage civil : *salus populi suprema lex est*, qui trouverait son origine dans la loi des XII tables.

35 INNOCENT III, au concile de Latran IV, c. 50, « Non debet », X 4, 14, 8. La consanguinité est le lien constitué par le sang, l'affinité celui constitué par le mariage. Le Concile de Latran IV aligne l'affinité sur les degrés prohibants de la consanguinité, désormais le quatrième degré en ligne collatérale.

36 Seul le c. 915 *CIC* 1983 évoque les situations des personnes qui ne peuvent pas accéder à la communion eucharistique, mais sans indiquer directement les personnes divorcées engagées dans une seconde union. Sur l'interprétation de ce canon, cf. CONSEIL PONTIFICAL POUR L'INTERPRÉTATION DES TEXTES LÉGISLATIFS, déclaration « Les divorcés remariés et la communion eucharistique », 24 juin 2000, dans *DC* (2000), 715-716. Le pape François fait référence à cette interprétation à propos des conditionnements qui peuvent atténuer, voire supprimer l'imputabilité et la responsabilité d'un acte. Il écrit : « c'est pourquoi, un jugement négatif sur une situation objective n'implique pas un jugement sur l'imputabilité ou la culpabilité de la personne impliquée » (*AL* 302. La référence à l'interprétation du conseil pontifical figure à la note 345).

interprète. Le discernement que demande le pontife montre que l'on ne peut pas réduire les situations individuelles à des cas généraux. Il encourage ainsi un 'regard différencié' sur les situations[37]. Le thème du regard est très présent dans l'exhortation[38]. La bienveillance du regard est la première condition du discernement[39]. Même dans une situation objective de péché, il existe une vie de grâce possible, qui requiert l'aide de l'Église. Cette aide peut être celle des sacrements[40] : « le discernement doit aider à trouver les chemins possibles de réponse à Dieu et de croissance au milieu des limitations »[41].

2.2 — L'indissolubilité comme don de Dieu

Le pape François cite la *relatio synodi* de 2014 : « l'indissolubilité du mariage ('ce que Dieu a uni, l'homme ne doit point le séparer', Mt 19,6), ne doit pas avant tout être comprise comme un 'joug' imposé aux hommes, mais bien plutôt comme un 'don' fait aux personnes unies par le mariage »[42]. Nous devons retrouver le sens positif de l'indissolubilité. Elle n'est pas une contrainte qui enfermerait l'homme dans la prison d'un mariage malheureux. Au contraire, elle exprime la solidité à laquelle aspire l'amour humain. La doctrine canonique enseigne que l'indissolubilité n'implique pas de supporter toute chose. Ainsi l'adultère donne-t-il au conjoint lésé, dès la première fois, le droit de mettre un terme définitif à la vie commune[43]. De même, la vie devenue dangereuse ou trop difficile permet aussi la séparation, au moins temporaire[44]. Le pape enseigne que le mariage est un parcours de « croissance permanente » : « cette forme si particulière de l'amour qu'est le mariage est appelée à une constante maturation ». Le pape cite l'enseignement de saint Thomas d'Aquin qui rappelle que la charité ne connaît pas de limite à son accroissement. L'amour dans le mariage, pour vivre, est appelé à ce développement. Cela permet au pape de conclure : « l'amour matrimonial

37 *AL* 298.

38 On trouve le thème plus d'une cinquantaine de fois, qu'il s'agisse du regard du Christ, du regard mutuel des époux, ou du regard que le pasteur est appelé à porter sur une situation.

39 Cf. *AL* 323 : « Jésus était un modèle, car lorsqu'une personne s'approchait pour parler avec lui, il arrêtait son regard, il regardait avec amour (cf. Mc 10, 21). Personne ne se sentait négligé en sa présence, puisque ses paroles et ses gestes étaient l'expression de cette question : 'que veux-tu que je fasse pour toi ?' ».

40 Cf. *AL* 305, note 351.

41 *AL* 305.

42 *Relatio synodi* 2014, n. 14, in *AL*, n. 62.

43 Cf. C. 1152 *CIC* 1983. Le code invite bien sûr préalablement la partie lésée au pardon. Mais ce pardon s'inscrit dans la possibilité de mettre un terme à la vie commune, y compris de manière définitive.

44 Cf. c. 1153 *CIC* 1983.

ne se préserve pas avant tout en parlant de l'indissolubilité comme une obligation, ou en répétant une doctrine, mais en le consolidant grâce à un accroissement constant sous l'impulsion de la grâce »[45]. L'indissolubilité trouve son sens dans la vie même du mariage : une vie de couple est aidée à grandir dans la solidité du mariage.

Une officialité reçoit de nombreuses personnes qui s'interrogent sur la validité de leur mariage. Ces personnes ont toutes été confrontées à l'épreuve de la séparation et de l'échec de leur mariage. On pourrait s'étonner que des procédures soient engagées après une longue vie matrimoniale, souvent après la naissance de plusieurs enfants. Mais cela montre la persévérance de certains couples pour maintenir la vie commune, avant de se résoudre à une séparation devenue la seule issue visible. L'objet de la procédure est de prouver la nullité du mariage[46]. La déclaration de nullité du mariage n'efface pas ce qui a été vécu. Elle indique seulement que le mariage qui a été célébré par l'Église n'avait pas les propriétés d'un mariage véritable, capable d'engager les époux dans un lien exclusif et perpétuel. L'éventuelle reconnaissance d'invalidité d'un mariage ne remet nullement en cause la légitimité des enfants qui sont nés du mariage[47]. Elle ne remet pas non plus ne cause la légitimité de la vie vécue ensemble : un mariage reste légitime jusqu'à ce qu'il soit déclaré invalide[48]. Si le droit insiste pour déclarer qu'un mariage invalide n'est pas sans effet, cela rejoint aussi une vérité humaine et spirituelle importante. Les conjoints ne peuvent sortir de l'expérience difficile qu'ils ont traversée qu'en assumant le passé qui est le leur. L'illusion serait de vouloir effacer ce qui a été vécu. Si l'Église a cru célébrer un mariage au jour de la célébration, Dieu lui-même y était d'une certaine manière engagé[49].

[45] *AL* 134.

[46] La doctrine commune enseigne qu'il existe des situations de mariage nul dont on ne peut pas prouver la nullité. En conscience, le fidèle peut considérer son premier mariage comme nul.

[47] Cela correspond à la doctrine du mariage putatif. Cette dernière apparaît dès l'époque médiévale, avec les Décrétales, et se fixe en droit canonique. La seule condition est celle de la bonne foi de l'un au moins des parents au moment où le mariage a été contracté. Cette disposition insiste sur le bien des enfants et l'honneur du mariage. La célébration publique, au cours d'une cérémonie liturgique, atteste que l'Église elle-même a cru célébrer un authentique mariage. Lorsqu'un mariage est déclaré invalide, le droit en maintient les effets pour toute la période antérieure.

[48] La jurisprudence de la Rote déclare ainsi, dans une sentence déjà ancienne : « Les enfants nés d'un mariage putatif bénéficient aussi de l'appellation d'enfants de mariage légitime » (*coram* ALBERGATO, 5 décembre 1670, n. 20, in *Sacræ Romanæ Rotæ Decisiones recentiarum selectarum*, XVI[a] pars, Venise 1697, *decisio* 367, 438-440).

[49] Dieu agit à travers des situations bien imparfaites. Il suffit de lire la généalogie de Jésus (Mt 1) pour s'en convaincre. L'ascendance du Christ, dont l'évangéliste fait mémoire, est loin d'avoir été fidèle aux commandements de Dieu. Pourtant, c'est à travers cette généalogie que se réalisent les promesses faites par Dieu au roi David : le Messie devait venir de sa descendance.

Même si le sacrement ne s'est pas réellement réalisé, nul ne peut affirmer que Dieu n'était pas présent. La procédure de nullité du mariage est donc au service de l'indissolubilité : elle doit vérifier les conditions concrètes de réalisation du lien. L'indissolubilité n'existe qu'à travers le seul véritable engagement des époux.

L'indissolubilité trouve une force particulière dans le mariage sacramentel, ce qui fait qu'aucune puissance humaine ne peut dissoudre un mariage sacramentel une fois consommé. Cette affirmation ne doit pas être lue comme une contrainte particulière du mariage sacramentel. L'amour humain porte en lui-même cette aspiration à durer. Le mariage entend donner à cet amour, par essence fragile, la solidité qu'il recherche[50]. La sacramentalité parfait cette solidité, appelant l'amour de l'homme et de la femme à se construire analogiquement à celui du Christ pour l'humanité. Certes, le pape François rappelle fréquemment que cette analogie est nécessairement une analogie imparfaite[51]. En cela, le mariage correspond bien à une vocation : « le mariage est une vocation, en tant qu'il constitue une réponse à l'appel spécifique à vivre l'amour conjugal comme signe imparfait de l'amour entre le Christ et l'Église »[52]. Le pape appelle ainsi à un véritable discernement vocationnel en matière matrimoniale.

Le sens de l'indissolubilité repose sur le baptême. Alors que l'amour humain est fragile, le mariage se fonde sur la solidité du baptême. Le pape Innocent III l'exprime ainsi : « le sacrement de la foi une fois conféré n'est jamais perdu, et il scelle [*ratum efficit*] le sacrement du mariage, en sorte qu'il perdure dans les conjoints aussi longtemps que demeure le premier »[53]. La force du mariage, la *vis matrimonii*, pour reprendre l'expression d'Alexandre III, repose donc sur celle du baptême. Le baptême est en effet un sacrement à caractère, selon les termes de la théologie postérieure : rien ne peut le détruire ou l'enlever. Le mariage des baptisés, une fois consommé, revêt cette dimension baptismale. Certes, il n'est pas un sacrement à caractère, mais il reçoit une solidité particulière. Le consentement des parties fait le mariage : « consensus facit nuptias », mais c'est le baptême qui scelle le

[50] Le pape François écrit : « je crois sincèrement que Jésus-Christ veut une Église attentive au bien que l'Esprit répand au milieu de la fragilité » (*AL* 308). C'est certainement un des caractères du mariage, et notamment du mariage sacramentel, que d'assumer cette fragilité.

[51] Cf. *AL* 73. Au n. 122, le pape écrit : « il ne faut pas faire peser sur deux personnes ayant leurs limites la terrible charge d'avoir à reproduire de manière parfaite l'union qui existe entre le Christ et son Église ; parce que le mariage, en tant que signe, implique 'un processus dynamique qui va peu à peu de l'avant grâce à l'intégration progressive des dons de Dieu' ». L'analogie implique elle-même un cheminement dans lequel sont engagés les époux.

[52] *AL* 72.

[53] Innocent III, décrétale « Quanto », X 4, 19, 7 (Dz 769).

sacrement : « sacramentum fidei […] ratum efficit coniugii sacramentum ». La solidité du mariage chrétien ne correspond donc pas à une simple discipline juridique, mais elle a un sens surnaturel. Tout ne repose donc pas sur le seul engagement des époux, qui est cependant absolument nécessaire, mais aussi et d'abord sur la force sacramentelle du baptême. Dans un récent discours à l'occasion de l'ouverture de l'année judiciaire au Tribunal de la Rote romaine, le pape François exhorte à un « nouveau catéchuménat »[54], afin de redécouvrir le sens du baptême et sa place dans le mariage, plutôt que d'insister seulement sur la dimension naturelle du mariage.

Conclusion

Amoris laetitia nous invite à redécouvrir le sens de la doctrine canonique du mariage. Elle n'est pas une doctrine statique qui partagerait les situations entre régulières et irrégulières. Elle est au contraire une doctrine dynamique, qui accompagne les personnes vers la réalisation de leur vocation à la lumière de Dieu. Elle nous rappelle ainsi le sens même du droit de l'Église : accompagner les hommes vers la réalisation effective de leur vocation baptismale.

[54] PAPE FRANÇOIS, discours à la Rote romaine, 22 janvier 2016.

Studia canonica 52 | 2018, 223-253
doi: 10.2143/STC.52.1.3285219

CATHOLIC INSTITUTIONS AND CHAPTER 11 REORGANIZATION BANKRUPTCY: USA CIVIL LAW AND CANONICAL CONSIDERATIONS

BRYAN V. PHAM, S.J.*

SUMMARY — When civilly incorporated public juridic persons in the United States experience financial distress, the filing of Chapter 11 reorganization bankruptcy may be a viable option to manage their obligations to creditors while fulfilling the mandate required by canon law. Specifically, reorganization bankruptcy provides these Catholic institutions with a way to retain ownership and control of their assets, remain in operation in order to continue their ministries, while at the same time be in dialogue with creditors in order to propose a viable reorganization plan to repay creditors in an equitable fashion. As Catholic institutions that have been civilly incorporated, these institutions are governed by two distinct legal systems (civil law and canon law), navigating these two complex bodies of laws can be a daunting task. Bringing together the major parts of the Chapter 11 reorganization bankruptcy process and canon law's stipulations regarding the ownership and the administration of temporal goods, this article seeks to highlight some of critical areas and procedures that Church officials and administrators of civilly incorporated public juridic persons in the United States should take into consideration as they discern and anticipate in the filing of Chapter 11 reorganization bankruptcy.

RÉSUMÉ — Aux États-Unis, lorsque des personnes juridiques publiques civilement incorporées sont une détresse financière, le dépôt d'un bilan avec un plan de réorganisation selon le Chapitre 11 de la loi sur les faillites des États-Unis peut être une option viable pour gérer leurs obligations à l'égard des créanciers tout en répondant au mandat exigé par le droit canonique. Spécifiquement, le dépôt d'un bilan avec un plan de réorganisation

* J.D., J.C.D., Professor of theology and canon law at Loyola Marymount University, Los Angeles; Catholic Chaplain at Loyola Law School; staff attorney, Loyola Immigrant Justice Clinic; attorney-consultant, the Education Law Services (Center for Catholic Education, LMU); Judge and a Defender of the Bond, Archdiocese of Los Angeles.

fournit à ces institutions catholiques un moyen de conserver leur droit de propriété et le contrôle de leurs biens, de demeurer en activité afin de continuer leurs ministères, tout en étant en dialogue avec les créanciers pour proposer un plan viable de réorganisation visant à rembourser les créanciers de manière équitable. Étant des institutions catholiques civilement incorporées, elles sont gouvernées par deux systèmes légaux distincts (droit civil et droit canonique) et doivent donc naviguer entre deux législations complexes; cela peut leur sembler intimidant. En rassemblant les parties les plus importantes des modalités du dépôt d'un bilan avec un plan de réorganisation selon le Chapitre 11 et les exigences du droit canonique en ce qui a trait au droit de propriété et à l'administration des biens temporels, cet article cherche à souligner les domaines et les procédures que les officiers ecclésiastiques et les administrateurs de personnes juridiques publiques civilement incorporées aux États-Unis devraient considérer lorsqu'ils prévoient déposer un bilan avec un plan de réorganisation selon le Chapitre 11.

Introduction

In the United States, reorganization bankruptcy procedure can be a useful tool. When in financial distress due to unendurable debts, reorganization bankruptcy provides corporations a pathway to retain some of their assets and operations while modifying their debt obligations with creditors.[1] While any corporations in the United States may file for reorganization bankruptcy, the decision to file for such bankruptcy is not a simple one. For civilly incorporated Catholic institutions (i.e., public juridic persons[2]) in the United States, the decision to file for reorganization bankruptcy can be predicated on a variety of reasons.[3] For some, filing for reorganization bankruptcy is a

[1] David A. SKEEL, "When Should Bankruptcy Be an Option (for People, Places, or Things)?" in *William and Mary Law Review*, 55 (2014), 2223.

[2] According to the 1983 *Code of Canon Law*, public juridic persons in the Catholic Church are erected by competent ecclesiastical authority. Endowed with the right to acquire, retain, administer, and alienate ecclesiastical goods (i.e., properties), public juridic persons receive their mission from the Church, speak in the name of the Church, and make available their ecclesiastical goods to further the mission of the Church.

[3] J.T. O'REILLY and M.S.P. CHALMERS, *The Clergy Sex Abuse Crisis and the Legal Responses*, New York, NY, Oxford University Press, Inc., 2014, 111. For some extensive analysis, including statistical data, of the reasons why religious institutions file for bankruptcy in the United States, see P. FOOHEY, "Bankrupting the Faith," in *Missouri Law Review*, 78 (2013), 719-776 and J.C. LIPSON, "When Church Fails: The Diocesan Debtor Dilemmas," in *Southern California Law Review*, 79 (2006), 364-455.

response to tort or negligence claims. Other institutions may file for bankruptcy protection as the result of financial mismanagement.[4]

When embarking reorganization bankruptcy, civilly incorporated public juridic persons[5] place themselves under the rigorous scrutiny of both civil law and canon law. Specifically, when civilly incorporated public juridic persons contemplate filing for bankruptcy, in addition to bankruptcy law, they must take into consideration particular law of the diocese (in the case of religious institutes, their proper laws), guidelines established by the conference of bishops, and the canon law of the Catholic Church (i.e., the 1983 *Code of Canon Law*[6]). While Catholic institutions are bound to observe canon law, there is no assurance that the civil bankruptcy courts will be receptive toward them. In fact, as recent legal history demonstrates, bankruptcy courts have generally held that canon law does not have legal standing in civil courts in the United States.[7] Thus, while the *Constitution of the United States* affords religious institutions a level of freedom (e.g., the *Establishment Clause*), such freedom is not absolute.[8] Consequently, the potential

4 C.P. WELLS, "Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy," in *Seton Hall Legislative Journal*, 29 (2005), 397. Cf. J.B. JARBOE, "Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments," in *Catholic Lawyer*, 37 (1996-1997), 155; P. FOOHEY, "When Churches Reorganize," in *American Bankruptcy Institute Law Review*, 88 (2014), 277-306; T.D. LYTTON, "Clergy Sexual Abuse, Tort Law Making Policy," in *Connecticut Law Review*, 39 (2006-2007), 809-895.

5 It should be noted that a public juridic person as such (e.g., a diocese, a parish, a religious institute, etc) has no recognized right or legal capacity to incorporate in the United States. Rather, an individual natural person (e.g., an administrator of a public juridic person) can file certificates of incorporation, articles of incorporation, and bylaws which create the civil corporation that corresponds to the public juridic person. Furthermore, even after an administrator civilly incorporates a public juridic person, it is the civil corporation that is recognized under civil law of the United States, not the juridic person as such (which continues to be recognized under canon law). For the purpose of this article, a public juridic person which has been civilly incorporated in the United States will be referred to as a "civilly incorporated public juridic person." Note, however, that this article only addresses civilly incorporated public juridic persons and not civilly incorporated private juridic person.

6 *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, English translation, *Code of Canon Law: Latin-English Edition, New English Translation*, prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 1999 (= *CIC/83* or the Code). Unless noted, all canons referred to in this article come from the *CIC/83*.

7 WELLS, "Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy," 385. Cf. JARBOE, "Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments," 161-164.

8 D.L. CARETTI, *Ownership, Control, Sponsorship, and Trusteeship: Governance Relationships within Private Catholic Religious-Sponsored Secondary Schools in the United States*,

conflict of laws implies that, while civilly incorporated public juridic persons may seek bankruptcy protection, the risk that these institutions may need to circumvent canon law in order to reap the benefit from bankruptcy filing is a real concern.[9]

The objective of this article is to provide an overview of how civilly incorporated public juridic persons in the United States can potentially navigate through reorganization bankruptcy under Chapter 11 of *Title 11* of the federal Bankruptcy Code[10] in a way that is consistent with canon law. Specifically, this paper examines some critical areas that public juridic persons such as parishes, dioceses, religious institutes, Catholic schools, and similar institutions may encounter as their alter egos—i.e., the civilly incorporated non-profit corporations—seek protection under Chapter 11 of the Bankruptcy Code.[11]

1 — *Bankruptcy and Catholic Institutions in the United States*

While not required, many public juridic persons such as parishes, dioceses, and religious institutes in the United States are civilly incorporated.[12] As civilly incorporated entities, these public juridic persons enjoy many rights allotted to them under American civil law just like any other

Ed. D diss., San Francisco, CA, University of San Francisco, 2013, 39. Cf. C.P. WELLS, "Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy," in *Boston College Law Review*, 44 (2003), 1214.

9 M.E. CHOPKO, "An Overview on the Parish and the Civil Law," in *The Jurist*, 67 (2007), 204. Cf. L.M. LOPUCKI, "The Debtor in Full Control — Systems Failure Under Chapter 11 of the Bankruptcy Code?" in *American Bankruptcy Law Journal*, 57 (1983), 106.

10 *11 U.S.C.*, available at: http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11.pdf (2013) (last accessed 20 December 2017) (= the Bankruptcy Code or *Title 11*). Chapter 11 is a chapter of *Title 11* of the Bankruptcy Code that permits reorganization bankruptcy under federal bankruptcy law. Chapter 11 is available at: http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11-chap11.pdf (last accessed 20 December 2017), (= Chapter 11, Chapter 11 bankruptcy, or reorganization bankruptcy).

11 P.J. BROWN, "Structuring Catholic Schools: Creative Imagination Meets Canon Law," in *Catholic Education: A Journal of Inquiry and Practice*, 13 (2010), 499. It is important to note that this study is only concerned with the liability of corporations and not with physical persons who may be associated with the corporations—e.g., owners, board members, etc. Moreover, this study will not address other forms of liabilities associated with other business models such as a sole proprietorship, a partnership, or a limited liability company.

12 In the United States, virtually every state in the union permits religious organizations to form non-profit corporations. Specifically, as of 2013, eighteen states have statutes/laws that provide for/or govern trustee corporations, and twenty-six states have statutes/laws provide for corporation sole.

corporations, and this includes the right to file for bankruptcy under the Bankruptcy Code. Applicable to all business entities, the Bankruptcy Code stipulates how incorporated institutions may file for bankruptcy protection and how state laws are applicable when necessary to determine property rights and contractual agreements.[13] Since civilly incorporated public juridic persons are also accountable to canon law, seeking bankruptcy protection for these institutions can be a complicated process because they must navigate between two distinct legal systems—canon law and civil law.

As a process, reorganization bankruptcy does not fit within the current framework of canon law. A search of the word "bankruptcy" in the *CIC/83* will yield nothing.[14] In similar light, David Skeel points out that the word "church" does not appear anywhere in the current Bankruptcy Code.[15] Consequently, as recent bankruptcy cases involving Catholic institutions demonstrate, it should come as no surprise that canon law does not control civil proceedings in the United States. While the *Constitution* of the United States discourages civil courts from deciding on matters relating to the internal affairs of religious organizations,[16] nevertheless, cases involving religious institutions appear before civil courts regularly. This means that issues relating to conflicts of law are unavoidable—particularly on issues of Church ownership, control, and jurisdiction over property.[17]

To be sure, the notion of bankruptcy is foreign to canon law. Indeed, some of the concepts and procedures used in a bankruptcy filing even appear to contradict canon law. For instance, the Bankruptcy Code requires that a bankruptcy estate be created for the bankrupt entity when a corporation submits its petition for reorganization. As a legally separate entity from the bankrupt corporation, a bankruptcy estate holds legal title and protects all non-exempted properties of the now-bankrupt corporation; without the bankruptcy court's permission, no person may access this bankruptcy estate. Canon law, however, considers these properties ecclesiastical goods

[13] Cf. *11 U.S.C.* §541, available at: http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11.pdf (last accessed 20 December 2017).

[14] Bryan V. Pham, "Public Juridic Persons and Chapter 11 Reorganization Bankruptcy," in *Studia canonica*, 51 (2017), 557.

[15] David A. Skeel, "'Sovereignty' Issues and the Church Bankruptcy Cases," in *Seton Hall Legislative Journal*, 29 (2005), 346.

[16] Cf. *Watson v. Jones*, 80 U.S. 679 (1872); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S 696 (1976); *Jones v. Wolf*, 443 U.S. 595 (1979).

[17] C.M. Davitt, "Whose Steeple Is It? Defining the Limits of the Debtor's Estates in the Religious Bankruptcy Context," in *Seton Hall Legislative Journal*, 29 (2005), 533. Cf. P.J. Brown, "The Perils of Bankruptcy: Rights and Obligations Regarding Clergy Support," in *Studia canonica*, 45 (2011), 45-46.

belonging to the public juridic person, and the surrendering of legal titles and control of them to another entity constitutes an alienation of ecclesiastical goods. If such a transaction were to take place, the Code mandates that certain canonical procedures prescribed in *Book V* of the Code be followed in order to protect the proprietary interests of the public juridic person.

Catholic canon law is binding only on Catholic institutions and Catholics wherever they are found. An American civil court, however, is neither bound by canon law, nor is it required to consider canon law in its deliberations.[18] In fact, most civil courts prefer to avoid having to deal with ecclesiastical questions and ecclesiastical laws altogether; civil courts would intervene only when the risk of a constitutional violation can be averted.[19] The general perception is that canon law has no place in a civil courtroom in America, and there should really be no need to involve canon law in any civil legal proceeding. Marianne Perciaccante writes:

> Courts should not have to turn to canon law, as long as secular documents, such as constitutions and contracts, are available for judicial interpretation. Use of the latter prevents the free exercise and establishment problems which occur when courts examine canon law; it also provides courts with the most accessible and easily understood documents for determining church-related secular problems.[20]

Nevertheless, litigious situations are usually never so well defined. Ambiguities still abound. Consequently, it is important to address how civil courts in the United States have traditionally handled litigation involving religious institutions, canon law, and property ownership. This will help to anticipate better what may happen when civilly incorporated public juridic persons in the United States file for bankruptcy protection under Chapter 11 of the Bankruptcy Code.

1.1 — Guaranteed Rights under the Constitutions

From the perspective of constitutional law in the United States, two amendments to the *Constitution* of the United States are worth considering: the First Amendment and the Fourteenth Amendment.[21] Under the First Amendment,

[18] WELLS, "Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy," 387.

[19] B.I. BITTKER, S.C. IDLEMAN, and F.S. RAVITCH, *Religion and the State in American Law*, New York, NY, Cambridge University Press, 2015, 368.

[20] M. PERCIACCANTE, "The Courts and Canon Law," in *Cornell Journal of Law and Public Policy*, 6 (1996), 178.

[21] The First Amendment (*U.S. CONST. amend. I*), along with the other parts of the *U.S. Constitution*, available at: http://www.senate.gov/civics/constitution_htm/constitution.htm (last accessed 20 December 2017).

the government is prohibited from establishing any religion—also referred to as the *Establishment Clause*—or to impede the free exercise of religion of any of its citizens (as well as securing freedom of speech, freedom of the press, the right to peaceably assemble, and the right to petition for governmental redress of grievances). In practical terms, this means that courts in the United States must be ultimately guided by secular principles rather than by theological principles, which are the orientation of canon law.[22] Dennis Goldford notes that, under the *Establishment Clause* of the First Amendment, the "government is secular in that it does not take a position on the truth or worth of religion [….] This means, therefore, that democratic majorities may not exercise their religious values in and through the institutions and instrumentalities of the government."[23] In addition to the First Amendment, persons have the right both to equal protection and to procedural due process under the law of the Fourteenth Amendment to the *Constitution*. The Fourteenth Amendment requires that a state must treat persons residing within its territory in the same manner as it would any other persons in similar conditions or circumstances.

While both the First Amendment and the Fourteenth Amendment form the basis for the free exercise of religion and beliefs in the United States for natural persons, Paul Madrid notes that, as legal persons, corporations in the United States are also afforded, to some extent, the same rights as natural persons.[24] In other words, as legal persons, corporations in the United States enjoy the right to freedom of speech, freedom from government entanglement (e.g., interfering with internal church affairs, etc), as well as the right to have equal protection and due process under the law.[25] Thus, the First

[22] Cf. PERCIACCANTE, "The Courts and Canon Law," 176-177.

[23] D.J. GOLDFORD, *The Constitution of Religious Freedom: God, Politics, and the First Amendment*, Waco, TX, Baylor University Press, 2012, 219. Cf. A. KOPPELMAN, "The Troublesome Religious Roots of Religious Neutrality," in *Notre Dame Law Review*, 84 (2009), 882.

[24] P. MADRID, "The Liability of Catholic Parishes in America: What Went Wrong and How to Fix It," in *Review of Litigation*, 28 (2009), 720. Some commentators, however, have reservations regarding the extent of rights enjoyed by legal persons. For more information, see Z. TEACHOUT, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United*, Cambridge, MA, Harvard University Press, 2014; G.R. STONE, "Citizens United and Conservative Judicial Activism," in *University of Illinois Law Review*, 2012 (2012), 485-500; G. SITARAMEN, "Contracting Around Citizens United," in *Columbia Law Review*, 114 (2014), 755-806.

[25] A. WINKLER, "Corporation Personhood and the Rights of Corporate Speech," in *Seattle University Law Review*, 30 (2007), 864. Cf. *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893) at 176; *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578 (1896) at 592; *Hale v. Henkel*, 201 U.S. 43 (1906) at 76; *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151 (1914) at 161-162; *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) at 880-881; *Pacific Gas & Electric Company v. Public Utilties Commission of California*, 475 U.S. 1 (1986) at 4 and 20-21.

Amendment and the Fourteenth Amendment establish that the role of the government "is not to make theological judgments but to protect the right of [persons] to pursue their own understanding of truth, within the limits of the common good."[26] Religion and the practice of faith in the United States, therefore, become subsets of a person's conscience and fall in the realm of personal privacy; the adherence to any set of religious tenets becomes a matter of each individual's conscience.[27] Andrew Koppelman writes:

> The Supreme Court has repeatedly said that neither it nor any other branch of the state can decide matters relating to the interpretation of religious practice or belief. The state may not attempt to determine the "truth or falsity" of religious claims, courts may not try to resolve controversies over religious doctrine and practice, may not undertake interpretation of particular church doctrines and the importance of those doctrines to the religion, may make no inquiry into religious doctrine, and may give no consideration of doctrinal matters, whether the ritual of a liturgy of worship or the tenets of faith.[28]

Additionally, Marianne Perciaccante notes:

> [Public] policy considerations stemming from the *Free Exercise* and *Establishment* clauses of the First Amendment should discourage courts from interpreting canon law in any form. When courts interpret canon law, they violate the *Free Exercise* clause by dictating to a religion what meaning the government sanctions for their beliefs as codified in canon law. Furthermore, courts violate the *Establishment* clause when they interpret canon law, because the courts establish an official position on the religious beliefs stated in the law.[29]

As adamant as civil courts in the United States may be in wanting to avoid deciding cases involving religious matters, however, what happens when issues relating to canon law emerge in civil proceedings?[30] Although the First Amendment and the Fourteenth Amendment preclude civil courts from interpreting theological doctrines, these amendments do not prohibit courts from intervening *when necessary*. Such intervention should only be taken, however, when civil courts can treat canon law in a way that does not violate

[26] M.W. McConnell, "Why Protect Religious Freedom?" in *Yale Law Journal*, 123 (2013), 781.

[27] J.J. Coughlin, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, New York, NY, Oxford University Press, Inc., 2012, 192. Cf. McConnell, "Why Protect Religious Freedom?" 782-786; P.J. Brown, "Square Pegs in Round Holes: Towards a Better Model of Parish Civil Law Structures," in *The Jurist*, 69 (2009), 271-272.

[28] Koppelman, "The Troublesome Religious Roots of Religious Neutrality," 865.

[29] Perciaccante, "The Courts and Canon Law," 172.

[30] Cf. K.E. Reeder, "Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits," in *Columbia Journal of Law and Social Problems*, 40 (2006), 125-174.

the First or the Fourteenth Amendments.[31] In *Serbian Orthodox Diocese v. Milivojevich*, the Supreme Court of the United States explains:

> The First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When the choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the *Constitution* requires that civil courts accept their decisions as binding upon them.[32]

Additionally, a number of scholars have made recommendations for how civil courts should treat religious matters—particularly in areas of internal affairs of religious organizations. These recommendations include: to encourage civil courts to give more deference to ecclesiastical tribunals and hierarchical religious bodies regarding internal matters—including the control of property; in the absence of fraud, collusion, or arbitrariness, to encourage civil courts to consider any decision formulated by church tribunals as conclusive; to make it unconstitutional for states to use their legislative power to intrude into a church's internal affairs—including questions of property ownership under canon law; and to allow the First Amendment of the *Constitution* to circumscribe the role that civil courts play in resolving internal church property disputes.[33]

1.2 — The Neutral Principles

In order to ensure that the rights protected by the First and Fourteenth Amendments are preserved, some precautions are needed. The Supreme Court stipulates that civil courts need to apply one of the two "neutral principles of law" if they are to intervene in and decide cases involving religious matters—i.e., when questions concerning canon law arise.[34] Boris Bittner and associates write:

> Neutral principles are mechanisms courts can use to avoid getting into ecclesiastical questions, including those related to the governance of churches. Thus,

[31] WELLS, "Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy," 385. Cf. W.J. RADEMACHER, J.S. WEBER, and D. MCNEILL, *Understanding Today's Catholic Parish*, New London, CT, Twenty-Third Publications, 2007, 132.

[32] *Serbian Orthodox Diocese v. Milivojevich* at 724.

[33] Cf. K. GREENAWALT, "Hands Off! Civil Court Involvement in Conflicts over Religious Property," in *Columbia Law Review*, 98 (1998), 1843-1907; *Watson v. Jones*; *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) at 16; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Hospital*, 393 U.S. 440 (1969) at 449.

[34] *Jones v. Wolf* at 597.

> the Court held that such principles are consistent with the long-standing principles that civil courts cannot determine ecclesiastical issues without running afoul of the *Free Exercise* and *Establishment Clauses*, and in fact, a neutral principles approach will better avoid crossing the boundary between secular and ecclesiastical matters than the traditional approach. Moreover, a neutral principles approach that relies on deeds, state corporations law, trust documents, church bylaws, and so on […], would allow hierarchical as well as congregational churches to spell out the ownership of church property before disputes arise, thus essentially determining the outcomes of such cases.[35]

The first neutral principle can be referred to as the "trust principle."[36] The trust principle is applicable in situations involving disputes regarding the ownership of property between a local church and a parent or an umbrella church that oversees that local church. In these situations, the legal issue frequently centers on the question: Does the local church that is physically located on the property in question own the property? Alternatively, does the umbrella church that supervises the local church from afar own the property? In applying the trust principle, state courts simply disregard the religious language and look only to the plain secular language of the ownership documents. Charles Whalen writes:

> State courts may disregard all of the religious language in the constitution of the local church and in the constitution of the mother church, and may look instead for civil law terminology that either creates or does not create a trust. Under this trust principle, the states are free to hold that unless there is sufficient civil law language to create a trust in favor of the mother church, local church property does not belong to, nor is under the supervision and control of, the mother church.[37]

The second neutral principle is referred to as the "majoritarian principle." The majoritarian principle is useful in situations where the governance of a church community—i.e., its decision-making—is based on the building of consensus through a voting process. Under the majoritarian principle, the hierarchical structure of a religious organization is typically not germane. According to the majoritarian principle, civil courts adopt the presumption that the governing mechanism of a local church is based on a voting system involving the majority of the members with voting rights of the congregation.

[35] BITTKER, IDLEMAN, and RAVITCH, *Religion and the State in American Law*, 373.

[36] *Jones v. Wolf* at 600. This principle can also be referred to as the "polity approach." Cf. J.L. RYAN, "The Delicate Balance Between Religious Freedom and Legal Accountability in an Increasingly Litigious Society," in *Journal of Civil Rights and Economic Development*, 24 (2009), 261.

[37] C.M. WHELAN, "Current Attitudes of the Courts Toward Church Properties and Liabilities," in *Catholic Lawyer*, 26 (1981), 221.

The results of all decisions concerning governance are based on the decision of the majority rather than on the decision of an umbrella supervising body that has the authority to veto the decision of the local members.[38] According to the majoritarian principle, the presumption that the decision of the majority can be vetoed only if there exists sufficiently clear civil language to counter the presumption. Whelan writes:

> If the charter of the local church or the constitution of the mother church explicitly rejects the majoritarian principle, and does so quite clearly in language that any civil lawyer would understand, one can overcome the majoritarian principle. In the absence of such "plain English," however, the courts may hold that the vote of the majority of the Church's members accurately reflects its government.[39]

Both the trust principle and the majoritarian principle are beneficial to church institutions since they allow civil courts to enter into the internal working of religious institutions and to decide on internal disputes without having to violate either the First Amendment or the Fourteenth Amendment.[40]

2 — *Pre-Fling Considerations*

Before filing for Chapter 11, administrators of civilly incorporated Catholic institutions should consider a number of critical factors that may impact the bankruptcy process. These factors include the canonical status of the juridic entities, how they relate to the diocesan bishop and other Catholic institutions, their civil corporate structure, their financial status, etc. Thus, administrators should familiarize themselves with these factors in order to anticipate any potential challenges that may arise in a bankruptcy process.

2.1 — Canonical Status of Catholic Institution in the Church

The canonical status of a Catholic institution signifies the rights and the obligations it has within the Catholic Church[41] and determines whether or

[38] *Jones v. Wolf* at 608. Cf. BITTKER, IDLEMAN, and RAVITCH, 384.

[39] WHELAN, "Current Attitudes of the Courts Toward Church Properties and Liabilities," 222.

[40] It is important to note that two neutral principles are not mutually exclusive. Boris Bittker and associates note that, in some circumstances, civil courts have been known to combine the different elements from both of the neutral principles in order to help them deliberate. Cf. BITTKER, IDLEMAN, and RAVITCH, *Religion and the State in American Law*, 380; *Serbian Orthodox Diocese v. Milivojevich*.

[41] Concerning whether an institution needs a special mandate before it can be considered "Catholic" in canon law, Phillip Brown writes: "[An institution] does not have to have any particu-

not certain canons in the Code are applicable. For example, if an institution was erected as a private juridic person, the canons in Book V of the *CIC/83* do not apply. However, if an institution is a public juridic person, then its properties constitute ecclesiastical goods, and the canons of Book V of the *CIC/83* do apply.[42] Consequently, even though a reorganization bankruptcy process is a civil procedure, knowing the canonical status of an institution can help determine which canonical procedure is required and which ecclesiastical authority is competent to give permission in canon law.[43]

Identifying the canonical status of a Catholic institution may not always be a simple task.[44] A civilly incorporated public juridic person may not necessarily include canonical/ecclesiastical language or norms in its articles of incorporation filed when it is incorporated under civil law. Under canon law, for example, parishes are *ipso iure* public juridic persons; however, the language that may appear in the civil documents of a civilly incorporated parish may not reflect its ecclesiastical public juridic status.[45] In other words, the articles of incorporation of a parish corporation may not indicate at all that it is, in fact, a public juridic person under canon law.

To complicate the situation even more, some parishes and religious communities may also have apostolates or ministries attached to them. Such apostolates usually include schools, hospitals, and other works of charity.[46] Under civil law, it is not uncommon that these apostolates are incorporated separately from the parishes or the religious communities that sponsor them.[47] However, while they are separately incorporated under civil law, such apostolates are very often not canonically independent from the religious institutions that started them; canon law still considers these apostolates as extensions of the public juridic persons. So, unless they were alienated according to the norms of canon law, the properties of the apostolates remain

lar juridic or legal identity in canon law to be considered a Catholic [institution] so long as it receives recognition of its Catholicity from a Church authority (which again should be the Holy See, the diocesan bishop, or any other ecclesial authority competent to grant such recognition)." BROWN, "Structuring Catholic Schools: Creative Imagination Meets Canon Law," 475. Cf. RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 107-108.

42 PHAM, "Public Juridic Persons and Chapter 11 Reorganization Bankruptcy," 556. Cf. c. 1257.

43 Cf. BROWN, "Structuring Catholic Schools: Creative Imagination Meets Canon Law," 479.

44 RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 108.

45 Cf. J.J. COUGHLIN, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, New York, NY, Oxford University Press, Inc., 2011, 134.

46 RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 107. Cf. J.A. CORIDEN, *An Introduction to Canon Law*, Mahwah, NJ, Paulist Press, 1991, 98-99.

47 BROWN, "Structuring Catholic Schools: Creative Imagination Meets Canon Law," 481.

the properties of the recognized public juridic persons.[48] Nevertheless, even if a civil institution that is also a public juridic person does not have any language in its articles of incorporation to indicate that it is a Catholic institution, the norms of canon law are still applicable.

2.2 — Inventory of Assets and Debts

While insolvency is not required for a corporation to file for bankruptcy,[49] simply knowing that a civilly incorporated public juridic person's debts outweigh its assets is not enough to petition for bankruptcy protection. Not all debts are weighted the same, and not all assets have the same level of liquidity. Therefore, before filing for Chapter 11, it is important for a civilly incorporated public juridic person to conduct an inventory and an assessment of all of its assets and any outstanding debts.[50]

A civilly incorporated public juridic person such as a parish, for example, contemplating reorganization bankruptcy should first ascertain its true net asset worth.[51] This means the pastor should, as the administrator of the parish corporation, investigate how much unrestricted funds (i.e., cash) the parish has in its checking/saving accounts, the value of all of the parish's real estate properties, the status of the parish's investments, stocks/bonds (if any), the value of any automobile registered under the parish's corporate title, etc.[52] Such an inventory should also include outstanding debts for which the parish is responsible. Any outstanding loans, mortgages, liens, or any creditors who may have other legal claims over the debts should also all be taken into account.[53]

[48] S.M. SANDERS, "Charisms, Congregational Sponsors, and Catholic Higher Education," in *Journal of Catholic Higher Education*, 29 (2010), 11. Cf. J.F. RIGALI, "St. Louis University Hospital Sold to For-Profit Corporation," in *Origins*, 27 (1998), 629-633.

[49] E. WARREN and J.L. WESTBROOK, "Financial Characteristics of Businesses in Bankruptcy," in *American Bankruptcy Law Journal*, 73 (1999), 536. Cf. R.K. WEISBORD, "Charitable Insolvency and Corporate Governance in Bankruptcy Reorganization," in *Berkeley Business Law Journal*, 10 (2014), 305-362.

[50] Cf. F.G. MORRISEY, "Planning for the Demise or Diminishment of Canadian Religious Institutes: Canonical Issues," in *Studia Canonica*, 49 (2015), 439.

[51] D.G. BAIRD and E.R. MORRISON, "Bankruptcy Decision Making," in *Journal of Law, Economics, and Organization*, 17 (2001), 363.

[52] CORIDEN, *An Introduction to Canon Law*, 167.

[53] It may be helpful for an administrator to keep a current inventory of properties owned by the juridic person and another current inventory of outstanding debts. Cf. L.A. DINARDO, "The Inventory of Property," in K.E. MCKENNA, L.A. DINARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 279-303.

Insurance policy may factor in a bankruptcy filing and should not be disregarded. Insurance that is common among businesses includes general liability insurance, property insurance, worker's compensation, professional liability insurance, and directors' and officers' insurance. As recent reorganization bankruptcy cases involving dioceses in the United States demonstrate, courts do permit insurance policies to be included as part of their bankruptcy estate. Thus, if an institution is insured, the bankruptcy courts may permit that money to be included as part of the bankruptcy estate.[54] In *In re Edgeworth*, the bankruptcy court wrote:

> The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim. When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate.[55]

From their perspective, however, potential debtors should not presume that insurance policies would automatically be included in a bankruptcy estate.[56] If nothing else, insurance companies would likely protest against having to pay. For example, an insurance company may argue that its policy does not cover intentional acts or criminal acts.[57] Nonetheless, administrators of civilly incorporated public juridic persons should be familiar with their insurance policies, read the fine print, and seek legal counsel as needed in order to protect the interests of the policyholders—i.e., the public juridic persons.[58]

[54] R.L. EPLING, K.A. BRENNAN, and B.R. JOHNSON, "Intersections of Bankruptcy Law and Insurance Coverage Litigation," in *Norton Journal of Bankruptcy Law and Practice*, 21 (2012), 103. Cf. *MacArthur Co. v. Johns-Manville Corp*., 837 F.2d 89 (2d Cir. 1988) at 92; *In re Titan Energy, Inc*., 837 F.2d 325 (8th Cir. 1988) at 328; J. HOPFENSPERGER, "Insurance Policies Play Major Role in Archdiocese Bankruptcy," in *Star Tribune*, 25 February 2015, available at: http://www.startribune.com/insurance-plays-big-role-in-archdiocese-bankruptcy/291169851/ (last accessed 20 December 2017).

[55] *In re Edgeworth*, 993 F.2d 51 (5th Cir. 1993) at 55.

[56] Cf. P.J. SCHILTZ, "The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty," in *Boston College Law Review*, 44 (2003), 956-957; J.R. FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, New York, NY, Palgrave Macmillan, 2014, 143.

[57] M. MOYLAN, "Charges May Let Archdiocese Insurers Avoid Abuse Payout," in *MPRNews*, 24 June 2015, available at: http://www.mprnews.org/story/2015/06/24/archdiocese-insurers (last accessed 20 December 2017).

[58] EPLING, BRENNAN, and JOHNSON, "Intersections of Bankruptcy Law and Insurance Coverage Litigation," 118. However, jurisdictions in the United State can vary, and some jurisdictions do not permit insurance to cover punitive damages. As such, the availability of insurance

2.3 — Property Ownership and Titles

Property ownership is one of the major areas where canon law and civil law diverge from one another and can be complicated for Catholic institutions.[59] Canon law recognizes that each public juridic person has the right to acquire, retain, administer, and alienate temporal goods. Civil law, too, recognizes that each corporation has the right to acquire, retain, administer, and sell properties. The point of contention between canon law and civil law is when a civil corporation in civil law is a composition of multiple public juridic persons in canon law (e.g., a diocese that is incorporated as a corporation sole that includes the properties of all the parishes of the diocese). When a civilly incorporated public juridic person files for reorganization bankruptcy, it is the task of the bankruptcy court to determine which properties would be included in the bankruptcy estate. Such determination is done at a Section 541 hearing. In making that determination, the bankruptcy court has to take into consideration constitutional law, property law, trust law, and perhaps even canon law.

For civilly incorporated public juridic persons such as dioceses and parishes, defending each public juridic person's right to retain its own ecclesiastical goods as understood under canon law is an important priority. What legal argument(s) could be used to protect the parishes' assets? Two arguments are available. The first is a constitutional argument. From a constitutional perspective, the diocese as a religious entity exercising its freedom of religion, for example, could argue that the bankruptcy court should rely on canon law only and should hold that each public juridic person owns and administers its own ecclesiastical goods.[60]

The second argument is based on charitable trust law (implied or otherwise). In civil law, a trust is defined as "the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds

coverage used as settlement is case-specific and/or jurisdiction-specific. Cf. *Home Insurance Company v. Am. Home Prods. Corp*., 550 N.E.2d 930 (N.Y. 1990) at 932; *PPG Industry, Inc. v. Transamerican Insurance Company*, 975 P.2d 652 (Cal. 1999) at 657.

59 Cf. COUGHLIN, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 227-233.

60 A.C. CARMELLA, "Constitutional Arguments in Church Bankruptcies: Why Judicial Discourse about Religion Matters, Symposium: Bankruptcy in the Religious Non-Profit Context," in *Seton Hall Law Review*, 29 (2005), 467. Cf. COUGHLIN, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 228. Cf. N.P. CAFARDI, "The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis. (Symposium: Bankruptcy in the Religious Non-Profit Context)," in *Seton Hall Legislative Journal*, 29 (2005), 373.

the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)."[61] This argument can be helpful in a situation involving, for example, a diocese which has been incorporated civilly as a corporation sole that includes the properties of all the parishes. Arguing that a charitable trust exists, the diocesan bishop could assert that, although the assets of the parishes fall within the control of the diocesan bishop as a corporation sole, the bankruptcy court should, nonetheless, exclude these assets from the diocese's bankruptcy estate because the diocesan bishop holds the assets belonging to the parishes only as a trustee. It is the parishioners who are the beneficiaries of this charitable trust rather than the diocesan bishop.[62]

2.4 — Seeking Legal Counsel

A Chapter 11 reorganization bankruptcy can be a complicated process. As discussed before, while bankruptcy is federal law, the bankruptcy court often defers to state law's interpretation of things pertaining to property ownership and contracts. Moreover, the bankruptcy process may include elements of constitutional law as well—particularly when church institutions and religious doctrines are involved.[63] With many nuances, the bankruptcy process can be both formidable and complex. Complicating things even more is canon law governing Catholic institutions. Simply put: when a public juridic person files for bankruptcy in the United States, canon law cannot be ignored.[64] Therefore,

[61] B.A. GARNER and H.C. BLACK (eds.), *Black's Law Dictionary*, 10th ed., St. Paul, MN, West Group, 2014, 1740. Each state has its own law regulating how trusts can be established and managed. In *Watson v. Jones*, the United States Supreme Court held that a trust could be expressed or implicit. Cf. *Watson v. Jones* at 722 and 725; GREENAWALT, "Hands Off! Civil Court Involvement in Conflicts over Religious Property," 1847-1859.

[62] B. SCHMALZBACH, "Confusion and Coercion in Church Property Litigation," in *Virginia Law Review*, 96 (2010), 448. Cf. D.S. LOURDUSAMY, "Canonical Perspective on Social Justice and Charity," in *Studia Canonica*, 49 (2015), 490. Cf. *Beatty v. Guggenheim Exploration Co*., 122 N.E. 378 (N.Y. 1919) at 380; WELLS, "Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy," 1215. Cf. SKEEL, "'Sovereignty' Issues and the Church Bankruptcy Cases," 349; REEDER, "Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits," 165-167. It may be helpful to explore the notion of a "constructive trust." For more on constructive trust, see A. KULL, "The Metaphorical Constructive Trust," in *Trusts & Trustees*, 18 (2012), 946.

[63] Cf. J.J. RACHLINSKI, C. GUTHRIE, and A.J. WISTRICH, "Heuristics and Biases in Bankruptcy Judges," in *Journal of Institutional and Theoretical Economics*, 163 (2007), 167-186; David A. SKEEL, "Bankruptcy Lawyers and the Shape of American Bankruptcy Law," in *Fordham Law Review*, 67 (1998), 497-522.

[64] PHAM, "Public Juridic Persons and Chapter 11 Reorganization Bankruptcy," 552.

employing the services of legal experts—particularly those trained in both bankruptcy law and in canon law—is advantageous when civilly incorporated public juridic persons file for bankruptcy protection in the United States.

When employing the services of legal experts, it is important to remember that, in the United States, a licensed attorney practicing civil law (e.g., a bankruptcy attorney) is considered an officer of the court who is granted the right to appear before the court in a certain jurisdiction in legal proceedings. A canon lawyer, on the other hand, is not considered an officer of the civil court. In a bankruptcy proceeding, therefore, it should be clear to all parties that it is the bankruptcy attorney who acts as the primary legal counsel in a bankruptcy proceeding.[65] The official capacity of the canonist should primarily be advisory or as someone who serves as a consultant who can provide expertise in the area of canon law and the inner workings of the Catholic Church. Thus, when necessary, the canonist may provide affidavits or give testimony in the capacity of an expert witness.

When considering seeking legal services, the issue of compensation for the legal services rendered can be a sensitive topic to broach.[66] A civil attorney has different methods of billing for his or her legal services. Such billing practices are generally governed by approved rules of professional conduct promulgated by the bar association of the state where the attorney practices law and/or by the American Bar Association. Billable services can include providing legal advice, court appearances, legal research, or any other kind of work done in preparation for the case. In short, any measurable amount of time spent on a case can be considered billable time. This is the general practice in the legal profession, whether an attorney works with a for-profit corporation or a religious based non-profit corporation.[67]

Misunderstandings can arise, however, concerning payments and compensation for services rendered when bankruptcy attorneys represent religious

[65] Clarity of roles and functions of legal counsel is important to avoid possible conflicts of interests. While the notion of conflicts of interests is implicit in canon law, it is explicit in civil law. All state bar associations have ethical codes or rules of professional conduct that are binding to all licensed attorneys in their respective jurisdictions. Cf. OREGON BAR ASSOCIATION, *Oregon Rules of Professional Conduct*, 19 February 2015, available at: http://www.osbar.org/_docs/rulesregs/orpc.pdf (last accessed 14 December 2017); WASHINGTON STATE BAR ASSOCIATION, *Washington Rules of Professional Conduct*, 14 April 2015, available at: http://www.wsba.org~/media/Files/Resources_Services/Ethics/RPC%20booklet.ashx (last accessed 20 March 2018).

[66] It is important to keep in mind that the sensitivity around compensation for legal services is also applicable to canon lawyers as well.

[67] B.R. HOPKINS and D.O. MIDDLEBROOK, *Nonprofit Law for Religious Organizations: Essential Questions & Answers*, Hoboken, NJ, John Wiley & Sons, Inc., 2008, 6.

organizations as clients. There may be an expectation on the part of the religious institution that attorneys who are willing to work with them would do so *pro bono* or at a discount.[68] It is important to address any concerns regarding compensation for legal services early in the representation process. Pamela Foohey writes:

> Though many Chapter 11 debtors may pay their bankruptcy attorneys reluctantly, some religious organization clients seemed to believe they had a religious right to a break on fees. Some leaders asked for a reduction in attorneys' fees, claiming that attorneys were "doing it for the better good of the community" or should "have mercy" on the congregation. Attorneys likewise had taken on the representations with the assumption that there was a "little bit higher risk of not being paid in full" as compared to small business [non-religious] clients. In fact, attorneys were willing to cut religious organizations breaks: 63% of the attorneys reduced their hourly rate, lowered their retainer fees, were "more generous" with time, or otherwise adapted their fees…In contrast, a few attorneys did not believe the nature of the client's business should influence the fees they charged.[69]

It is worth noting, however, that many bankruptcy law firms do provide the initial consultation free of charge. Additionally, some of these law firms may also have service contracts available which usually cover a variety of legal services for a single fee. These are pre-packaged deals, and the fees for the packages are usually negotiable. Administrators of public juridic persons should consider carefully the terms of the payment and the language of the service contracts before making any commitment. Moreover, it is also common practice for administrators to get a second or even a third opinion concerning their legal situations before agreeing on a particular course of action with a particular bankruptcy attorney or law firm.

2.5 — Obtaining Permission to File for Bankruptcy

Once all the information has been compiled and the administrator of the public juridic person decides that the best course of action is to seek Chapter 11 protection, the next step in the process is to obtain the necessary permission from the competent authority.[70] This permission must be granted before

[68] Cf. R.L. KEALY, "Methods of Diocesan Incorporation," in *CLSAP*, 48 (1986), 172.

[69] FOOHEY, "When Churches Reorganize," 298.

[70] Depending on the policy/guidelines of the juridic entity, in some circumstances, an administrator of a civilly incorporated public juridic person may need the permission from the competent ecclesiastical authority *before* he or she can even begin exploring whether or not filing for bankruptcy is an option. Thus, it is important that the administrator have a thorough knowledge of the juridic entity he or she represents.

the bankruptcy petition is filed in bankruptcy court because a bankruptcy proceeding would constitute a transaction that may endanger the stable patrimony of the public juridic person.[71] Both canon law and civil law have norms regulating how such permission is to be obtained. Compliance with these norms is necessary for validity.

Under civil law, obtaining the required permission for a corporation to file for bankruptcy should not be complicated. Depending on the state's corporation law, the corporation's articles of incorporation, internal policies, guidelines, and bylaws determine the process needing to occur before a major decision such as filing for bankruptcy is made. Thus, an administrator or a manager of the civil corporation would simply need to follow the protocol(s) articulated in these documents when he or she makes a decision on behalf of the corporation. Generally, this entails the administrator or the manager presenting to the corporation's governing board all the proper information and asking the board for a vote on the matter; if the governing board agrees, then the administrator may proceed with the bankruptcy filing process. If questions arise subsequently concerning whether or not a particular administrator was authorized by the governing board to file for bankruptcy on behalf of the corporation, the bankruptcy court would review the protocol(s) taken by the administrator or manager to ascertain whether or not established corporate formalities were followed.

Regarding canon law, since the Code does not address bankruptcy, the challenge is to identify what type of act of administration described in the Code appropriately describes the filing of reorganization bankruptcy.[72] Here, reorganization bankruptcy fits best under canon 1295 of the *CIC/83*—a *transaction that can worsen the patrimonial condition of a public juridic person*.[73] Accordingly, an administrator of a civilly incorporated public juridic person would need to obtain permission from the competent ecclesiastical authority before filing for bankruptcy.[74] But whether the filing of Chapter 11 falls under canon 1295 or not, such a determination should be established beforehand and be noted in the bylaws or statutes of the civil corporation.

Determining who is the competent authority to grant the permission will depend on the nature of the public juridic person seeking such permission.

[71] PHAM, "Public Juridic Persons and Chapter 11 Reorganization Bankruptcy," 577.

[72] RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 118.

[73] Cf. PHAM, "Public Juridic Persons and Chapter 11 Reorganization Bankruptcy," 551-580.

[74] Cf. M. WELCH, "Sponsorship," in P.J. COGAN (ed.), *Selected Issues in Religious Law*, Washington, DC, Canon Law Society of America, 1997, 106. Furthermore, the rationale and the procedures required for transactions falling under canon 1295 were discussed in chapter 2 of this dissertation.

In addition to universal law, proper law and particular law should also be consulted. Thus, for example, if the public juridic person is a diocese or an institution that is subject to the diocesan bishop, the competent authority to grant the necessary permission would be the diocesan bishop. However, before he can grant such permission, the diocesan bishop may need the consent of the diocesan financial council and the college of consultors—along with any interested party who may be affected by the transaction if the situation demands it.[75] If the public juridic person is a religious institute, the competent authority is designated in the institute's proper law.

3 — *Piercing the Corporate Veil*

Ownership implies possession and control. In corporate law, when a business entity is incorporated, it becomes a distinct legal person with recognizable rights under the law. These rights include the right to possess and to control assets.[76] The articles of incorporation and the bylaws of an incorporated business define and regulate the duties and the responsibilities of the administrator of the corporation—particularly those duties and responsibilities that concern the care of the corporation's assets. If a corporation has a governing board (e.g., a board of directors, a board of members, etc), the duties and the responsibilities of this board should also be articulated in these same documents.

What is important to remember, however, is that a civilly incorporated business is both legally and physically distinct from other corporations. As a legal construct, a corporation has recognition as an independent legal person. Virginia Ho writes:

> Defining the corporation itself is, of course, fairly simple—it is a legal entity possessing the characteristics defined by the corporate law of its state of incorporation, or if beyond the United States, by the law of the jurisdiction in which it was formed. Although what constituencies together form the "corporation" is at times unclear, state corporate law, the terms of the corporate charter, and other contractual mechanisms establish the corporation as a separate legal person and delimit its formal boundaries.[77]

[75] Cf. c. 1292 §1.

[76] R.A. Booth, "Who Owns a Corporation and Who Cares?" in *Chicago-Kent Law Review*, 77 (2001), 150.

[77] V.H. Ho, "Theories of Corporate Groups: Corporate Identity Reconceived," in *Seton Hall Law Review*, 42 (2012), 885.

Consequently, when a business entity is incorporated, a proverbial veil "covers" it, forming a clear boundary that separates this business corporation from other business corporations. A corporate veil essentially gives the business corporation legal distinction. With a corporate veil in place, the administrator of the corporation acts on behalf of the corporation in accordance with the approved documents (e.g., articles of incorporation, bylaws, statutes, constitutions, etc) which govern the internal structure of the corporation. Respecting a corporation's distinct legal identity implies that the corporation has an obligation to observe its corporate formalities. The corporation is not to be controlled or managed by any entity that is external to the ordinary structure of corporation.[78]

Maintaining a distinctive corporate identity can be precarious for civilly incorporated public juridic persons.[79] This is one of the areas where being accountable to both canon law and civil law can be challenging for Catholic institutions in the United States. For example, when a public juridic person that is a parish initiates a civil legal proceeding or engages in a transaction that can worsen its stable patrimonial condition, canon law requires that the pastor must first obtain written permission from the diocesan bishop.[80] Under civil law, however, this is problematic because, if civilly incorporated, civil law recognizes the parish as a distinct corporation that is separate from the diocese—which, if civilly incorporated, is another distinct corporation. When the pastor (who is the administrator of the parish corporation) seeks permission from the diocesan bishop (who is the administrator of another corporation) before filing for bankruptcy, the implication may be that the parish and the diocese are actually one corporation with the diocesan bishop as the primary administrator rather than two separate legal corporations with distinct administrators.[81] Such a transgression implies that corporate formalities

[78] S. OTTOLENGHI, "From Peeping behind the Corporate Veil, to Ignoring It Completely," in *The Modern Law Review*, 53 (1990), 346.

[79] Cf. M.E. CHOPKO, "Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures," in *The Jurist*, 69 (2009), 250. As discussed in chapter 1, when a public juridic person is civilly incorporated, while its canonical status does not change under canon law, its corporate status is now recognized under civil law. Similar to other corporations, a veil covers the public juridic person and makes it legally distinct from other corporations. With that recognition, the civilly incorporated public juridic person is expected to behave like any other corporations under the law—that is, a civilly incorporated public juridic person must act in accordance with its articles of incorporation as well as its approved bylaws.

[80] PHAM, "Public Juridic Persons and Chapter 11 Reorganization Bankruptcy," 574. Cf. cc. 1276, 1288, and 1295.

[81] Cf. OTTOLENGHI, "From Peeping behind the Corporate Veil, to Ignoring It Completely," 338-353. Moreover, when the diocesan bishop asserts his authority and imposes a moderate

have been disregarded. With the absence of a clear separation between the two or more corporations, the proverbial *corporate veil* has been compromised and could be pierced.[82]

In the United States, the civil court is competent to determine if a corporate veil has been, in fact, pierced. In order to ascertain whether or not the corporate veil has been pierced, the civil court would look at the degree "of economic, financial, personnel, and administrative integration [between the two or more corporate entities], as well as the use of a common public persona."[83] Thus, "piercing the corporate veil" requires a demonstration that a corporation has violated certain corporate formalities—e.g., purposefully filing inaccurate corporate records to conceal or to misrepresent information concerning partnership with others outside the corporation, failing to maintain a critical arm's length relationship with other corporation entities, the intermingling or the commingling of assets, etc.[84]

Nevertheless, Catholic institutions should understand that they are not exempt from having to follow established civil norms.[85] Following civil laws

tax that all parishes and other public juridic persons in his diocese are expected to pay (even for the sake of some diocesan needs), this action can be problematic under civil law with regards to separate incorporation and corporate formalities. Cf. CORIDEN, *An Introduction to Canon Law*, 166; RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 109; DAVITT, "Whose Steeple Is It? Defining the Limits of the Debtor's Estates in the Religious Bankruptcy Context," 540-543.

82 The piercing of a corporate veil is defined as "[a] judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts." *Black's Law Dictionary*, 1332. Cf. WELCH, "Sponsorship," 109-110.

83 HO, "Theories of Corporate Groups: Corporate Identity Reconceived," 889.

84 Cf. H.G. HENN, *Handbook of the Law of Corporations*, St. Paul, MN, West Publishing Co., 1970, 250-255; T.J.P. RADWAN, "Keeping the Faith: The Rights of Parishioners in Church Reorganizations," in *Washington Law Review*, 82 (2007), 120 fn. 221; A.J. MAIDA and N.P. CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, St. Louis, MO, Catholic Health Association of the United States, 1984, 203; SKEEL, "'Sovereignty' Issues and the Church Bankruptcy Cases," 353-355. However, it is important to point out that piercing the corporate veil is not an easy task. Peter Oh writes: "[From] its inception, veil piercing has been an abysmal failure. There is no uniform test for veil-piercing, which typically requires demonstrating that a corporation was an "alter ego" or "instrumentality," controlled or dominated by a shareholder to perpetuate a fraud, wrong, or injustice that proximately caused loss or injury to a plaintiff. To apply this complex test, courts have compiled an expansive list of *ex post facto*-specific factors, none of which is dispositive, weighted, or necessarily related to the underlying harm." P.B. OH, "Veil-Piercing Unbound," in *Brigham Young University Law Review*, 93 (2013), 90.

85 RYAN, "The Delicate Balance Between Religious Freedom and Legal Accountability in an Increasingly Litigious Society," 259.

governing corporate behaviors should also be a priority in addition to following canon law. Both civil law and canon law must be followed. This means that the administrators of these institutions must make a concerted effort to reconcile, as much as possible, the norms of both civil law and canon law in all legal documents (articles of incorporation, bylaws, etc).[86]

4 — *The Bankruptcy Petition and Schedules*

Once the permission of the competent ecclesiastical authority has been obtained, the administrator may proceed with filing the petition for reorganization bankruptcy on behalf of the civilly incorporated public juridic person.[87] After making sure that all information is accurate and that all required signatures are accounted for,[88] the administrator should file the bankruptcy petition with the clerk of the bankruptcy court in the appropriate jurisdiction.[89] Additionally, a filing fee must be paid to the clerk at the time of filing.[90] Once filed, the bankruptcy case is assigned a number; the bankruptcy court uses this case number for identification and tracking purposes.[91]

With the bankruptcy petition filed, the administrator of the civilly incorporated public juridic person will need to submit schedules to the bankruptcy court. Schedules are a series of documents containing information regarding

[86] Cf. KEALY, "Methods of Diocesan Incorporation," 167.

[87] It is worth noting that the actual filing of the bankruptcy petition with the bankruptcy court's clerk is what initiates the bankruptcy process. Thus, the filing of the bankruptcy petition itself constitutes the order of relief. Cf. C.J. TABB and R. BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 2nd ed., Newark, NJ, Matthew Bender & Company, Inc., 2006102; *11 U.S.C.* §301.

[88] The bankruptcy petition, also referred to as *Form 1* of the *Official Bankruptcy Forms*, is a standard petition and is available on most bankruptcy courts' websites. For the United States Bankruptcy Court, District of Oregon, the *Form 1* is available at: http://www.orb.uscourts.gov/forms (last accessed 15 December 2017).

[89] TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 92; §1408 of *28 U.S.C.*, available at: http://www.gpo.gov/fdsys/pkg/USCODE-2013-title28/pdf/USCODE-2013-title28.pdf (2013) (last accessed 3 March 2018).

[90] David A. SKEEL, *Debt's Dominion: A History of Bankruptcy Law in America*, Princeton, NJ, Princeton University Press, 2001, 229. As of January 2016, the fee for a reorganization bankruptcy petition under Chapter 11 is $1,717.00. This fee covers both the bankruptcy petition and a one-time administrative fee. Cf. Rule 1002 of the *FRBP*; *28 U.S.C.* §1930 (a); http://www.insb.uscourts.gov/webforms/newlaw/FeeSchedule.pdf (last accessed 15 January 2016).

[91] The PACER system uses case numbers to identify and to track bankruptcy cases.

the debtor's assets and debts, and are designated as *Schedule A*, *Schedule B*, *Schedule C*, and so forth.[92] For example:

> *Schedule A* lists all real property to be included in the bankruptcy estate. When the bankrupt corporation is a religious institute, for example, real properties such as convents, houses, or any other buildings or lands owned by the religious institute could be included in *Schedule A*.
>
> *Schedule B* lists all personal property belonging to the debtor. For a religious institute, items such as automobiles, books, and artifacts in the community's library and archive, furniture, light fixtures, lawnmowers, microwaves, refrigerators, freezers, etc., could all be included in *Schedule B*.[93]
>
> *Schedule C* lists all assets for which the debtor wants exemption from the bankruptcy estate.[94] Examples of assets that may be included in *Schedule C* are charitable trusts, major gifts with specific donors' intent, retirement accounts, formation accounts, etc.
>
> *Schedule D* identifies all creditors with secured claims. The bankruptcy court gives secured claims in this schedule higher priority (based on the APR) than those listed in *Schedules E* and *F*.
>
> *Schedule E* identifies creditors with non-secured claims. Examples of non-secured claims to be included in *Schedule E* are unpaid wages, salaries, commissions, contributions allotted to employee benefit plans, certain taxes owed to government, etc.
>
> *Schedule F* also identifies non-secured creditors but only those with claims based on service fees, unpaid tort settlements, credit card balances, etc. While both *Schedule E* and *Schedule F* are reserved for non-secured creditors, the bankruptcy court considers creditors listed in *Schedule E* to have more priority than creditors listed in *Schedule F*.[95]

[92] S.M. HENRY, *The New Bankruptcy Code: Cases, Developments, and Practice Insights Since BAPCPA*, Chicago, IL, American Bar Association, 2007, 461. Cf. S. WICKOUSKI, *Bankruptcy Crimes*, 3rd ed., Washington, DC, Beard Books, 2007, 35; *Black's Law Dictionary*, 1546; *11 U.S.C.* §521(a)(1)(B).

[93] Depending on the circumstances, it is worth noting that individual members of a religious institute may be required to compile an accurate list of personal items in their possession to be included in a *Schedule B*. Thus, a religious sister who is a member of a religious institute in reorganization bankruptcy may be required to submit a list of all the items in her possession that she had acquired since entering the religious institute. Sister's list may include her television, radio, computer, printer, cell phone, e-reader, textbooks, etc.

[94] It should be clear that any property exemption would need the approval of the bankruptcy court. Cf. WEISBORD, "Charitable Insolvency and Corporate Governance in Bankruptcy Reorganization," 305-362; *Hobbes et al., Trustees v. Bd. of Ed.*, 253 N.W. 627 (Neb. 1934); *Freme v. Maher*, 480 A.2d 783 (Maine 1983); *Parkview v. St. Vincent Medical Center*, 211 B.R. 619 (Bankr. N.D. Ohio, 1997); *In re Winsted Memorial Hospital*, 249 B.R. 588 (Bankr. D. Conn. 2000).

[95] Cf. HENRY, *The New Bankruptcy Code: Cases, Developments, and Practice Insights Since BAPCPA*, 462-463.

It is ultimately the responsibility of the administrator of the civilly incorporated public juridic person to collect all the relevant information properly and accurately and to submit completed schedules to the bankruptcy court in a timely manner.[96] Moreover, some schedules may require supplementary documentation such as financial reports, property titles, or official physical descriptions of the properties (e.g., official blueprints, land surveys, etc). It is the responsibility of the administrator to make sure that all additional documents are submitted promptly to the bankruptcy court along with the schedules.[97] Once filed, schedules and accompanying documents become public documents and are available to creditors, creditors' committees, and all other interested parties.

5 — *A Public Juridic Person Reorganizing*

Having filed the bankruptcy petition and having submitted the schedules, the bankruptcy process is well underway with some of the major events or mechanisms in a bankruptcy proceeding shifting into high gear. These include the creation of the bankruptcy estate, the automatic stay, the 341 meeting, etc. Three mechanisms, however, are particularly relevant to a civilly incorporated public juridic person in reorganization bankruptcy, and they deserve special attention. These are: the debtor-in-possession (or DIP), the ability to continue operating as a business while reorganizing its debts, and the initial exclusive rights to formulate and to propose reorganization plans.

5.1 — Public Juridic Person and Debtor-in-Possession

The option of having a DIP makes reorganization bankruptcy under Chapter 11 particularly appealing to a civilly incorporated Catholic institution. When a business corporation files for Chapter 11, the Bankruptcy Code

[96] J.C. LIPSON, "The Shadow Bankruptcy System," in *Boston University Law Review*, 89 (2009), 1621. It is important to note that the bankruptcy court considers any purposeful misrepresentation of information or any concealment of facts relating to schedules as a criminal act, subject to criminal prosecution. WICKOUSKI, *Bankruptcy Crimes*, 35.

[97] Other supplementary documentation may include current financial statements and balance sheets, recent cash-flow statements, the most current statement of operations and the previous year's federal income tax return (when applicable), corporate resolutions, corporation ownership statement (if the corporation is owned by a parent corporation), etc.

permits it to become a DIP.[98] In the same manner, when a civilly incorporated public juridic person files for reorganization bankruptcy, it becomes the DIP. This means that the public juridic person retains ownership and control of its assets. In canon law, this means that the relationship between a public juridic person and its ecclesiastical goods does not change: the ecclesiastical goods remain in the possession of the public juridic person. Thus, there is no alienation of ecclesiastical goods because the ownership and control of ecclesiastical goods are not transferred to a third party.[99]

Furthermore, having a DIP permits the administrator of a civilly incorporated public juridic person to continue as the administrator of the corporation after it enters reorganization bankruptcy. No change of administration or management is necessary. This means that, for example, the pastor of a parish corporation filing for reorganization bankruptcy remains the administrator of the DIP (the bankrupt parish); likewise, the provincial superior of the religious institute remains the administrator of the DIP (the bankrupt religious institute), etc.[100]

A DIP cannot be guaranteed in every case, however. In some circumstances, a bankruptcy court may intervene and replace a DIP with a *case trustee*.[101] A case trustee functions just like that of a DIP. Such intervention, however, is rare. The bankruptcy court would typically not take such a drastic measure unless, after giving prior notice and holding a hearing, there is convincing evidence of wrongdoing on the part of the debtor (e.g., fraud, the mishandling of the bankruptcy estate, etc) which warrants replacing a DIP with a case trustee.[102]

[98] E. WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, New York, NY, Aspen Publishers, 2008, 54. Cf. *11 U.S.C.* §1107. For the sake of simplicity, when this study refers to the DIP, it is referring specifically to the physical person who has been legally designated to be the administrator or the manger to act on behalf of the DIP.

[99] Cf. FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, 146. It is important to remember that, even though no alienation of ecclesiastical goods take place after bankruptcy is declared, this does not necessarily mean that there will not be alienation of some ecclesiastical goods later in the bankruptcy process. For example, a reorganization plan may require that the public juridic person sell some assets in order to repay some debts.

[100] In some cases, the treasurer of the public juridic person could be designated as the administrator or the manager of the DIP. For more information regarding the roles and functions of treasurers in religious institutes, see R. GEISINGER, "Some Ongoing Considerations in Canon Law for Treasurers General of Religious Institutes," in *Periodica*, 95 (2006), 227-258.

[101] WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 56. Cf. R.J. BERDAN and B.G. ARNOLD, "Displacing the Debtor in Possession: The Requisites for and the Advantages of the Appointment of a Trustee in Chapter 11 Proceedings," in *Marquette Law Review*, 67 (1984), 457-490.

[102] Cf. *11 U.S.C.* §1105.

5.2 — Continuation of Operation and Ministry

One of the advantages of a Chapter 11 bankruptcy is that the bankrupt corporation remains in operation while reorganizing its debts.[103] Reorganization bankruptcy under Chapter 11 permits a civilly incorporated public juridic person to continue its works while it reorganizes its debts. For a civilly incorporated public juridic person such as a parish, a diocese, or a religious institute, the ability to maintain its ministry is preferable.[104] This means that Catholic churches, schools, shelters, and other similar places can keep their doors opened and be accessable to the people they serve.[105]

The continuation of business operations while in Chapter 11 reorganization bankruptcy, however, is not without some constraints. A DIP is subject to the supervisory authority of both the bankruptcy court and the U.S. trustee.[106] Moreover, creditors, through the creditors' committee, may also want to play a role in supervising how a debtor spends money; after all, creditors have the right to protect their legal and financial interests by making sure that the bankruptcy estate is not being misappropriated by the DIP. Consequently, a creditors' committee will also have some oversight authority over the DIP as well. David Skeel writes:

> Under the bankruptcy laws, any proposal to use, sell, or lease property that is outside the "ordinary course of business" is subject to a hearing and "approval by the bankruptcy court [and the creditors' committee]."[107] This suggests that a church could not start a substantial new soup kitchen ministry or close and sell a school during the bankruptcy case unless the bankruptcy judge gave it the go ahead.[108]

Consequently, any business transaction done by a DIP while in bankruptcy proceeding is subject to supervision and to some restrictions.[109] Thus, in order to remain in operation, the debtor is usually required to submit a business plan and a proposed budget to both the bankruptcy court

[103] Cf. ibid., §1108.

[104] Cf. WELLS, "Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy," 1213.

[105] M.M. MOREY and J.J. PIDERIT, *Catholic Higher Education: A Culture in Crisis*, New York, NY, Oxford University Press, Inc., 2006, 201. Cf. RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 107-111.

[106] As discussed before, having the DIP under the supervision of the U.S. trustee does not necessarily mean that the public juridic person has alienated its ecclesiastical goods. Supervision does not necessarily imply control.

[107] Citing *11 U.S.C.* §363(b)(1).

[108] SKEEL, "'Sovereignty' Issues and the Church Bankruptcy Cases," 354.

[109] WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 55.

and the creditors' committee for approval.[110] In the case of a diocese, for example, the diocesan bishop (or his designee) would need to submit a business plan detailing how the diocese intends to operate its ministries and to carry out its various administrative functions while reorganizing its debts. Additionally, the diocesan bishop (or his designee) would need to propose a budget detailing expenses it will need to keep the diocese in operation. After the approval of the business plan and the operating budget by both the bankruptcy court and the creditors' committee, the diocese will be permitted to continue to operate while it is in bankruptcy proceeding. Moreover, in order to have sufficient funds to keep the bankrupt diocese in operation, the bankruptcy court may allow the diocese to access the bankruptcy estate and/or take out loans through the various DIP financing schemes.

5.3 — Reorganization Plan

The centerpiece of a Chapter 11 reorganization bankruptcy is a confirmed reorganization plan. The length of time a corporation remains in bankruptcy court is dependent on how long it takes for the interested parties to come to a consensus regarding a reorganization plan and for the bankruptcy court to confirm it. The Bankruptcy Code does not provide a template for a reorganization plan. Accordingly, the determination of a viable reorganization plan is ultimately in the hands of the debtor, in particular, the debtor's ability to negotiate with its creditors. Once confirmed by the court, however, a reorganization plan signals the termination of the bankruptcy process, and the bankrupt corporation emerges from bankruptcy.

Before approving or confirming a reorganization plan, however, the bankruptcy court must have assurance that certain objectives have been (or will be) met. To ensure this objective, the court looks to three specific areas. First, the bankruptcy court must be satisfied that the proposed reorganization plan is both *reasonable and feasible*.[111] Second, the court must be satisfied that the plan passes the *best interest test*.[112] Finally, the court must be satisfied that fraud or any illegal or unjust dealing had not been involved in the

[110] Ibid., 69.

[111] Cf. H.R. MILLER and S.Y. WAISMAN, "Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?" in *American Bankruptcy Law Journal*, 78 (2004), 189.

[112] Again, the interests of creditors—especially those that have the most to lose—must be protected, and the *best interest test* provides this assurance. Cf. N. MARTIN and O. TAMA, *Inside Bankruptcy Law: What Matters and Why*, New York, NY, Aspen Publishers, 2008, 183.

process leading up to the confirmation of the reorganization plan.[113] If there is evidence that fraud is involved, the court has the right to revoke the reorganization plan completely—even if the creditors have unanimously approved the same plan beforehand.[114] Once the court is confident that a reorganization plan is reasonable, feasible, fair, and that no fraud was involved, the court will confirm it.

A confirmed reorganization plan binds all parties involved. An approved reorganization plan replaces all previous contracts and agreements between the debtor and the creditors. In other words, a confirmed reorganization plan provides a blueprint for how the reorganization of debts will take place—i.e., which debts will be repaid fully, which debts will be repaid at a reduced amount, which debts will be discharged, and what any repayment schedule will be. Once the bankruptcy court has confirmed the reorganization plan, it is critical that the administrator of a civilly incorporated public juridic person has the fiduciary duty to diligently take all the necessary steps to ensure that the terms of the confirmed reorganization plan are carried out promptly and effectively.

An administrator of a public juridic person also has the obligation to make sure that the terms of a confirmed reorganization plan are implemented in ways that are consistent with canon law. For example, a reorganization plan may require the alienation of some stable patrimony or some ecclesiastical goods in an amount that exceeds the limit set by the conference of bishops; or when, in order to execute one or more terms stipulated in the reorganization plan the administrator of the public juridic person is required to place an act of extraordinary administration (or an act of ordinary administration which is more important in light of the economic condition of the diocese).[115] In such a case, it is the responsibility of the administrator of the public juridic person to consult the proper ecclesiastical law and competent authority to ensure that the proper canonical procedures are observed.

[113] Cf. *11 U.S.C.* §1104(a)(1) and (2).

[114] WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 161. Cf. *11 U.S.C.* §1144. There are times when a debtor is required to submit a disclosure statement to the bankruptcy court in addition to the confirmation plan. In such a case, a disclosure statement must provide "adequate information" concerning the affairs of the debtor to enable the holder of a claim or interest to make an informed judgment about the plan. However, it is more likely that the bankruptcy court will consider the reorganization plan itself sufficient and not require any additional disclosure statement. Ibid., §1125.

[115] Cf. cc. 1291-1295.

7 — *Emerging from Chapter 11 Reorganization Bankruptcy*

Once a reorganization plan has been approved by the creditors' committee and confirmed by the bankruptcy court, and once the statutory waiting period is over (usually thirty days), the bankruptcy process officially ends. The civilly incorporated public juridic person is then said to have emerged from a Chapter 11 bankruptcy.[116] One of the most notable consequences of emerging from a Chapter 11 bankruptcy is that, unless they were addressed in the reorganization plan, all pre-petition and permitted post-petition debts are officially discharged.[117]

Even after it has emerged from bankruptcy, however, the work of the public juridic person regarding bankruptcy should not be considered done. While emerging from reorganization bankruptcy clearly provides an opportunity for a corporation to restart, the post-bankruptcy period is also an opportunity for a public juridic person to reassess the strengths and the weaknesses of its corporate model.[118] Depending on the situation, perhaps this is an appropriate time to consider adopting a new corporate model altogether. For instance, the administrator of the public juridic person and his or her advisors may explore what corporate structure would provide the best protection under civil law with regard to it assets, or which civil corporate model is most consistent with canon law.[119] Additionally, the post-bankruptcy period may also be the occasion to incorporate the norms of canon law into the civilly incorporated public juridic person's articles of incorporation and bylaws in order to ensure that its corporation protocols are consistent with both civil law and canon law.

Conclusion

For a number of reasons, the option to file for reorganization bankruptcy under Chapter 11 is both critically important and massively appealing to a civilly incorporated public juridic person in financial distress. Three of these reasons are worth particular mention. First, a Chapter 11 reorganization

[116] G. ZHANG, "Emerging from Chapter 11 Bankruptcy: Is It Good News or Bad News for Industry Competitors?" in *Financial Management*, 39 (2010), 1722.

[117] Cf. *11 U.S.C.* §502(g), (h), and (i).

[118] Cf. MADRID, "The Liability of Catholic Parishes in America: What Went Wrong and How to Fix It," 707-735.

[119] J.S. MANNY, "Governance Issues for Non-Profit Religious Organizations," in *Catholic Lawyer*, 40 (2000), 4.

bankruptcy permits a civilly incorporated public juridic person to continue its work while reorganizing its debts. Second, through a DIP, a civilly incorporated public juridic person is able to retain control and negotiate the fate of its assets. The third reason is that, with the right to propose a reorganization plan, a civilly incorporated public juridic person retains the right to be involved in determining how some of its debt obligations can be met in an equitable and just fashion.

While reorganization bankruptcy is appealing, the process is not without uncertainties that could place the interests of a civilly incorporated public juridic person in jeopardy. Consequently, there are some preliminary considerations that a public juridic person should take into consideration. As highlighted in this paper, such considerations include the juridic entity's status under canon law, the civil corporate nature of a Catholic institution, ownership of property, assessments and inventories of assets and debts, insurance policies, prospective debtors and their priority, the ability of fulfilling certain debt obligations in a viable reorganization plan, as well as permissions needed (and from whom) before a Catholic entity can file for bankruptcy.

There can be any number of reasons why civilly incorporated Catholic institutions in the United States should consider bankruptcy protection. Given the financial difficulties that Catholic institutions have experienced in recent years as the result of civil litigations, reorganization bankruptcy under Chapter 11 may be the only viable strategy for these civilly incorporated public juridic persons to remain intact in order to continue the work of the public juridic person, to ensure that adequate precautions are taken when the patrimonial condition is at risk, and to compensate secured creditors equitably.[120] However, the discernment to file for Chapter 11 requires administrators of civilly incorporated public juridic persons to consider some critical elements of their institutions under both canon law and civil (bankruptcy) law. Doing so would help to anticipate whether or not reorganization bankruptcy is a viable option, as well as how to file for reorganization bankruptcy in a manner that is not in violation of the law of the Church.

[120] J.B. JARBOE, "Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments," in *Catholic Lawyer*, 37 (1996-1997), 155. Cf. FOOHEY, "When Churches Reorganize," 277-306.

Studia canonica 52 | 2018, 255-270
doi: 10.2143/STC.52.1.3285220

RECENSIONS — BOOK REVIEWS

AKPOGHIRAN, Peter O., *The Catholic Formulary in Accordance with the Code of Canon Law*, vol. 1, *Curial Acts*, New Orleans, Guadalupe Book Publishers, 2014, 432 p. — ISBN 9781500171384.

This is the first in a six-volume series of handbooks for curial and tribunal officials, all with the same title and different subtitles. The other five books in the series are subtitled *Consecrated Life Acts* (2014), *First Instance Marriage Nullity Acts*, 2nd ed. (2017), *Second Instance Marriage Nullity Acts*, 2nd sed. (2017), *Penal Acts* (2014), and *Laicization and Readmission Acts* (2015). This review is limited to the first volume. In seventy-four brief chapters, it gives sample documents for a variety of acts of the diocesan curia. Some canonical discussion and explanations of certain documents are given, but for the most part the texts are presented without comment.

A major problem with the work is the mis-categorisation of many of the sample documents. For example, the first section of the book has the heading "Rescripts." Of the forty-nine sample documents, however, the vast majority are decree-provisions, especially the many letters of appointment to various offices. Other sample documents include permissions that make provisions (e.g., permission to accept a Mass foundation or to build a church), which should be given by decree rather than by rescript. There are also various attestations and testimonials (e.g., a certificate of ordination), several private juridical acts (e.g., petitions, wills), and bilateral acts (agreements between a diocesan bishop and a religious superior or another bishop). None of these is a rescript, which is a unilateral act that grants a favour in writing, usually in response to a petition. Calling these diverse acts "rescripts" may mislead the bishop and others into thinking that the canonical rules on rescripts are applicable, when this is not the case for all but a few of the sample documents.

Certain other problems exist with respect to particular documents. The following statement, in a sample document appointing a judge, appears as well in numerous other letters of appointment. *By this appointment, I grant you all the powers, rights, obligations, and functions of an ecclesiastical Judge*. Actually, the bishop does no such thing; he simply makes the appointment. The rights, obligations, and faculties of the office are determined by

law and are acquired *ipso iure* at the moment the appointment takes effect. If the bishop wants to delegate additional faculties not already contained in universal or particular law, he must grant them expressly.

Another statement occurring frequently in the letters of appointment is the following. *This appointment can be revoked by me or by any of my successors*. This could leave the impression that the bishop may replace the office holder at any moment without observing any procedure. In fact, the decree of appointment cannot be revoked once the office is validly acquired. The A. might instead have referenced the canons on the loss of office, perhaps with a brief discussion of the differing situations: voluntary and involuntary transfer, administrative (simple) removal, removal during a term of office or during an indeterminate appointment, etc.

A few documents are unnecessary and may even cause confusion. For example, the A. includes a sample document by which a newly appointed pastor certifies his acceptance of the office. However, a decree of appointment requires no acceptance. It is a unilateral act of the ecclesiastical authority. Using a certificate of acceptance of the office could give rise to the mistaken notion that the priest is free *not* to accept it, which would be contrary to the obligation of obedience he owes to his ordinary (c. 273).

A most problematic sample document is an invasive questionnaire seeking to uncover impediments and irregularities to holy orders. Although intended for the candidates to determine for themselves whether they need a dispensation, this instrument in the hands of seminary officials and formation personnel carries with it the potential risk of a grave abuse of the rights of the candidates to privacy and a good reputation.

John M. HUELS

BEUGRÉ, Honoré D., *Le droit canonique. Notions, sources et dispositions générales*, Abidjan, Éditions UCAO, 2013, 277 p. – ISBN 9782915693553

L'abbé Honoré D. Beugré est natif de l'archidiocèse de Gagnoa, en Côte-d'Ivoire. Il est l'actuel directeur de l'Institut Supérieur de Droit Canonique de l'Université Catholique de l'Afrique de l'Ouest, dont le siège est à Abidjan. Cet Institut est agrégé à l'Université pontificale Urbanienne, à Rome. Invité en février 2018 par le Président de l'UCAO et par le Directeur de l'Institut de Droit Canonique, j'ai pu vérifier de près le dynamisme de l'Institut, malgré sa jeunesse. Il bénéficie d'ailleurs d'un accueil bienveillant de la *Revue de l'Université Catholique de l'Afrique de l'Ouest*.

Trois numéros de cette Revue ont publiés les travaux des derniers Journées de droit canonique organisées par l'Institut. Le numéro 43, en 2014, porte sur « Le droit canonique au service de la pastorale », avec les contributions suivantes : « Les ministres de la parole de Dieu selon le code de Droit canonique » (T. Tshingombe, cfi) ; « La nécessité du baptême et de la confirmation pour la célébration du sacrement de mariage » (H. Beugré) ; « Le mariage pour tous, un défi pour l'Église et pour l'Afrique » (F. K. Sebo) ; « Le droit pénal de l'Église, un instrument au service de la pastorale » (N. Edjo) ; « Praxis matrimoniale » (P. Bogui N.) ; « Du mariage civil et coutumier au mariage canonique : difficultés pastorales actuelles et perspecrtives d'avenir » (N. Edjo) ; « Le droit canonique et le défi de l'inculturation » (T. S. K. Yetohou).

Le n° 48, de 2016, traite du « mariage canonique en contexte africain » et développe les aspects suivants : « La préparation au mariage canonique selon le can. 1063 » (Y. D. Zoni) ; « La stérilité et l'impuissance sexuelle dans le mariage canonique » (S. Nougbo) ; « Situation de divorcés remariés dans l'Église catholique » (R. Agbo) ; « Mariage coutumier, civil et religieux. Quel type de mariage pour le baptisé africain ? Cas du Bénin et de la Côte-d'Ivoire » (N. Edjo) ; « La préparation juridico-pastorale et administrative pour la célébration du mariage canonique » (H. D. Beugré).

« Le droit canonique et la miséricorde » fait l'objet du n° 49 de la Revue, publié en 2017. Il contient comme études : « Lecture juridico-canonique de Luc 6, 36 : 'Soyez miséricordieux comme votre Père céleste est miséricordieux' » (Y. D. Zoni) ; « La justice et la miséricorde en droit canonique » (H. Beugré) ; « La miséricorde en droit administratif canonique » (C. Yatala) ; « La Bulle d'indiction du jubilé extraordinaire de la Miséricorde et ses implications canoniques » (T. S. Yetohou) ; « La miséricorde, fondement du sacrement de pénitence de l'indulgence » (A. Kouassi) ; « Le droit particulier et son inculturation au service de la mission » (Y. D. Attila).

Comme Natale Loda, professeur au Latran, l'écrit dans la préface, l'étude du droit canonique ne doit pas être comprise comme l'apprentissage d'une technique, mais « une expérience à vivre chaque jour sa propre foi dans le service ecclésial qui contribue à la charité dans la communion pour le salut des âmes ». Émerge ainsi la finalité pastorale du droit canonique, dans la coopération de chaque fidèle selon son rôle et la place qu'il occupe dans l'Église. Le professeur Loda souligne que le professeur Beugé a réussi à donner « son unité au plan anthropologique chrétien, où les expériences concrètes de la vie humaine sont lues à la recherche de la vérité de Dieu à travers le don de la justice ».

Avec ce premier ouvrage, l'abbé Honoré Beugé se propose de répondre à la question : « Pourquoi le droit dans l'Église ? » C'est pourquoi le chapitre premier entend préciser « la spécificité du droit canonique » (p. 15-37). Défini comme un ensemble de normes de droit divin, naturel et humain, le droit canonique apparaît au service de la foi et de la charité. Il reste « un médicament qui permet la condition d'ascèse et engage à la quête permanente de la conversion, de la foi et de la charité », étant donné que sa finalité première est le *salus animarum*.

Le chapitre II présente une « brève histoire et sources du droit canonique » (p. 39-52), les deux principaux types de sources étant les sources fondamentales (les faits sociaux et ecclésiaux qui produisent le droit particulier) et les sources gnoséologiques (sources de connaissance du droit canonique). Ce chapitre met en lumière le lien entre la science canonico-juridique et les autres sciences, la théologie, la morale, la philosophie, l'histoire, le droit civil notamment.

« Le *Corpus iuris canonici* : le Code de 1983 » est l'objet du chapitre III (p. 53-72). Il comprend essentiellement l'énumération des principaux textes extérieurs au Code et le plan général de celui-ci. Comme l'auteur l'écrit, il ne s'agit pas tant d'aimer le droit en général et le droit canonique en particulier, que « de connaître et d'être compétent en une matière qui s'impose inéluctablement comme un instrument indispensable pour le service de l'Église, pour l'exercice de son ministère ou sa vocation baptismale ».

Nous en venons à la partie essentielle de l'ouvrage, figurant sous le titre de « dispositions générales ». Il s'agit en premier lieu des « lois ecclésiastiques » (p. 73-122), objet des canons 7 à 22. Ceux-ci formulent les aspects définitionnels et techniques des lois, « conformément à la législation en vigueur tout en restant attachés à la tradition doctrinale et juridico-canonique de l'Église ». Cette tradition permet de découvrir la signification, les caractéristiques et les aspects techniques des lois dans la législation de l'Église. C'est pourquoi, outre les canons 7 à 22, il s'impose de consulter d'autres sources du droit canonique permettant d'approfondir la connaissance des lois ecclésiastiques.

« Les règles communes aux actes administratifs particuliers (cann. 35-47) sont étudiées au chapitre V (p. 123-140). Ces règles manifestent l'aspect pastoral du pouvoir de gouvernement dans l'Église. En mettant ces instruments juridiques à la disposition de ceux qui exercent le pouvoir exécutif, « le législateur ecclésiastique montre que l'exercice du pouvoir dans l'Église ne porte pas seulement sur le bien commun mais aussi et surtout sur les situations et les cas concrets et particuliers ». Pour répondre efficacement aux situations particulières, il importe de donc connaître les règles communes

qui régissent les actes administratifs particuliers, afin que leur utilisation promeuve le bien commun et le bien particulier de l'Église, Peuple de Dieu.

Le chapitre VI envisage « les décrets et préceptes particuliers (cann. 48-58) » (p. 141-155). Ces deux actes administratifs sont soumis au principe de légalité. En ce qui concerne le décret particulier, cela se traduit par la formule *secundum iuris*. Pour le précepte particulier, ladite soumission apparaît dans la finalité principale *ad legis observantiam urgendam*. Il convient, écrit l'abbé Beugé, d'approfondir les canons qui s'appliquent à ces deux actes administratifs, « afin de respecter le principe de légalité qui les régit pour un meilleur exercice du pouvoir exécutif dans l'Église ».

« Les rescrits » sont présentés au chapitre VII (p. 157-178) dans leurs trois moments : la notion de rescrit, sa structure et ses distinctions, les dispositions y relatives. L'acte administratif qu'est le rescrit reste soumis à des règles bien précises dont certaines semblent être comprimées dans les vies d'obreption et de subreption. Les conditions d'exécution doivent être respectées, surtout quand le rescrit est donné sous la forme commissoire.

Quant aux « dispenses », elles font l'objet du chapitre VIII (p. 179-200) et figurent aux canons 76-93 du CIC de 1983. La dispense est un « acte administratif d'une importance capitale dans l'exercice du pouvoir de gouvernement », écrit le professeur Beugé. Il partage les règles communes aux actes administratifs particuliers, tout en étant régi par des règles spécifiques.

En continuant de suivre l'ordre des canons, nous arrivons aux « statuts et règlements intérieurs (cann. 94-905) » (p. 201-209). L'auteur relève que le Concile Vatican II a conduit les laïcs à prendre conscience du droit d'association et de l'action de l'Esprit Saint dans les associations et communautés nouvelles. Le Code de 1983 a promulgué le droit d'association (dont l'auteur aurait pu reconnaître le caractère fondamental et mentionner aussi le devoir correspondant, tout aussi fondamental) et défini le cadre d'expression et d'exercice de ce droit. La définition de ce cadre pour chaque association exige d'en rédiger les statuts et les règlements intérieurs. Ceux-ci doivent être soumis au principe de légalité et expriment la capacité d'initiative et d'association des fidèles du Christ.

Les annexes qui suivent (p. 211-260) ne sont rien d'autre que la transcription littérale de l'ensemble des canons sur les normes générales du Livre I du Code latin.

Le professeur Honoré Beugé insiste dans la conclusion (p. 261-263) sur le fait qu'il est important de savoir distinguer les différents instruments juridiques afin de connaître les conditions requises pour la validité et l'efficacité de chaque acte administratif. Le principe juridique essentiel qui guide

l'utilisation de ces actes est le principe de légalité. Par conséquent, « il convient d'approfondir les canons qui s'appliquent à ces actes administratifs, afin de respecter scrupuleusement ce principe de légalité qui exige que l'émanation de tout acte respecte la conformité aux dispositions canoniques qui le régissent ». Cette connaissance permettra la relecture du droit de l'Église à la lumière des orientations de Vatican II et des questions nouvelles de cette époque d'une part, et, d'autre part, « contribuera à rendre crédible l'engagement missionnaire de toute l'Église et le témoignage des laïcs dont la vocation spécifique est de parfaire l'ordre temporel ».

Dominique LE TOURNEAU

BEUGRÉ, Honoré D., *Le droit canonique. Personnes, actes, pouvoirs et offices*, Abidjan Éditions UCAO, 2016, 365 p. – ISBN 9782915693676.

L'abbé Honoré D. Beugré est directeur de l'Institut supérieur de droit canonique de l'Université Catholique de l'Afrique de l'Ouest, dont le siège est à Abidjan, en Côte-d'Ivoire. Il a obtenu un doctorat en droit canonique à l'Université pontificale du Latran. D'où la préface du professeur N. Loda, professeur de droit oriental à ladite université. Celui-ci tient à souligner que le présent ouvrage « est un instrument de travail et d'étude qui nous fait pénétrer non seulement dans la structure charismatique et institutionnelle de l'Église à travers le Droit canonique, mais aussi nous fait reconnaître sa forme et sa beauté tant antique que moderne ».

Le professeur Beugré a publié en 2013 un premier manuel intitulé *Le droit canonique, notions, sources et dispositions générales*. Le présent ouvrage achève l'étude du Livre I du Code de 1983 en abordant essentiellement les canons 96 à 196 du code latin et les canons connexes.

Une première partie, à caractère introductif, présente la nature juridique et théologique du droit canonique, sous le titre : « Le domaine d'application du Code de droit canonique » (p. 37-59). Elle se divise en trois chapitres. Le premier délimite le champ d'application du Code de 1983 à partir des canons introductifs 1 à 6. Ceux-ci mettent en exergue certains principes directeurs et la nécessité de se référer à toute la tradition canonique pour une meilleure compréhension du Code, une bonne interprétation et application de ses dispositions juridico-canoniques.

Le chapitre deuxième est une étude des différents aspects de la coutume canonique, soit des canons 23 à 28 (p. 61-76), dont la norme charnière est le canon 23, aux termes duquel « la coutume est la meilleure interprète de la loi ». Ce chapitre traite d'une notion juridico-canonique qui rappelle

le contexte culturel et sociologique de plusieurs Églises en terre de mission, précisément en Afrique, souligne l'auteur. De fait, les Églises en Afrique s'implantent et vivent la foi dans des contextes marqués par les coutumes et les traditions. Les normes canoniques sur la coutume peuvent les aider dans leur tâche.

Le chapitre suivant traite des « décrets généraux et des instructions » (p. 77-88), abordant donc les canons 29 à 34. Ces dispositions sont efficaces et indispensables dans la titularisation des droits et des devoirs des fidèles ainsi que dans l'exercice du pouvoir exécutif et législatif. Ces instruments juridiques permettent une meilleure coopération au pouvoir de gouvernement.

La deuxième partie porte sur « personnes et actes », notions qui ne sont pas de simples concepts juridiques, mais des institutions juridico-canoniques permettant à la législation canonique de répondre à des questions fondamentales du genre : qui est personne dans l'Église ? Quels sont les différents types de personnes et leurs statuts juridiques ? Quelle est la valeur juridique des actes et quelle sont les conditions de leur validité ? La réponse à ces interrogations suppose de retourner à la grande tradition de l'Église « pour découvrir des notions importantes autour desquelles s'est formé le droit canonique comme science ».

Le chapitre IV porte sur « les personnes physiques et personnes juridiques (cann. 96-123) » (p. 95-161). L'auteur présente les facteurs qui influencent les droits et les devoirs des personnes physiques, âge, raison, détermination du territoire, acquisition ou perte du domicile ou du quasi-domicile, consanguinité, affinité, adoption, rite et leur conséquences juridiques. Puis il expose tous les éléments juridiques qui accompagnent l'existence des personnes juridiques publiques et privées dans l'Église, en mettant l'accent sur les actes collégiaux.

« Les actes juridiques (cann. 124-128) » font l'objet du chapitre suivant (p. 163-185). Ces actes « ouvrent une perspective de réflexion sur la distinction entre valide ou invalide ». Ainsi qu'entre acte licite et illicite. Les actes illégitimes ou illicites peuvent être rescindables ou non, selon que l'autorité compétente peut les rescinder ou non.

Nous en venons ainsi à la troisième partie sur « pouvoirs et offices », deux institutions juridico-canoniques « intimement liées dans leur nature et leur compréhension dans la mesure où l'une ne va pas sans l'autre ». Cette partie vise à répondre aux questions suivantes : Comment comprendre le pouvoir et son exercice dans l'Église ? Quels sont le cadre et les modalités de son exercice ? Quelle en est la finalité ? Comment définir les offices et

quelle est leur importance dans l'Église constituée en société et gouvernée par le Pontife romain ? Plus précisément, quelle est la réglementation relative aux offices ecclésiastiques qui semble structurer l'institution Église ? Enfin, comment comprendre l'exercice des offices en lien avec l'exercice du pouvoir et la nature de l'Église, Peuple de Dieu, communion et Corps mystique du Christ ?

Le chapitre VI, sur « le pouvoir de gouvernement (cann. 129-144) » (p. 193-246), précise le sens des termes, notamment pourquoi le législateur a préféré parler de *potestas regiminis* plutôt que de *potestas iurisdictionis*, le terme juridiction désignant davantage l'exercice du pouvoir judiciaire, alors que la *potestas iurisdictionis* et le pouvoir judiciaire sont deux réalités distinctes. Le législateur a voulu éviter une confusion. En outre, le Code de 1983 lève l'équivoque du pouvoir de juridiction divisé en for interne et for externe, pour formuler qu'il s'agit dans les deux cas de l'exercice de l'unique et même pouvoir.

Un meilleur exercice du pouvoir exige la distinction entre pouvoir ordinaire et pouvoir délégué, entre for interne et for externe, pouvoir subdélégué, facultés avec les conséquences juridiques qui en découlent. L'exercice du pouvoir de gouvernement exige le respect scrupuleux des principes juridiques et canoniques (l'on aurait aimé voir mentionner ici également le respect scrupuleux des droits et des devoirs fondamentaux de tous les fidèles et des laïcs), et il doit se faire en étroite relation avec le pouvoir de sanctification et le pouvoir d'enseignement, dans la mesure où les trois pouvoirs sont intimement liés et inséparables. De plus les dispositions juridiques sur l'exercice du pouvoir dans l'Église sont marquées par une compréhension diaconale du pouvoir. « Si l'on ne veut pas trahir la finalité du pouvoir dans l'Église, il doit être exercé en faveur du Peuple de Dieu et dans un souci permanent de promouvoir la charité, la miséricorde et la communion ecclésiale ».

« Les offices ecclésiastiques (cann. 145-196) » sont étudiés dans le dernier chapitre (p. 247-336). La finalité de l'exercice de l'office ecclésiastique « en vue du bien spirituel » montre le changement de perspective pour une meilleure compréhension et un bon exercice dudit office, désormais libéré du système des « bénéfices ». La question n'est plus de savoir quel serait le rapport de l'office ecclésiastique aux revenus de la donation attachée à la fonction, mais comment il doit concrètement être exercé en vue du bien spirituel, du salut des âmes et du bien de l'Église.

Les offices apparaissent comme des fonctions qui structurent la vie de l'Église. Ils constituent un service, et « même un ministère dont l'Église a besoin de manière permanente ou, du moins, en certaines circonstances, pour accomplir sa mission évangélisatrice ». L'office jouit de la stabilité. Pour le

protéger, l'Église proclame sa liberté de nomination, de présentation et de désignation de ceux qu'elle appelle à le remplir, notamment pour ce qui est de la charge épiscopale.

Dans la conclusion générale (p. 337-342), l'abbé Beugé souligne le fait que « plusieurs Église particulières souffrent du non-respect des dispositions juridiques et pastorales en raison soit d'une mauvaise application des normes soit d'une négation du droit de l'Église […] soit d'une ignorance des principes et procédures régissant l'exercice du pouvoir de gouvernement soit d'un manque de personnel qualifié, formé ». Il propose comme solution « d'accueillir le droit canonique comme une science au service de la charité, de la pastorale, de la fraternité et de la communion ecclésiale d'une part, et un instrument indispensable pour tous ceux qui exercent un pouvoir de gouvernement ou un charge et un service dans l'Église, d'autre part ».

L'on notera aussi que chaque institution présentée « établit dans sa définition et sa compréhension un rapport étroit avec la théologie et les autres sciences humaines, notamment la philosophie et l'anthropologie ainsi que la doctrine conciliaire ».

L'ouvrage comporte enfin une liste de « sources et bibliographie » (p. 343-355).

Dominique LE TOURNEAU

GILLESPIE, Kevin, *Ecclesiastical Office and the Participation of the Lay Faithful in the Exercise of Sacred Power: Towards a Theological and Canonical Understanding of the Mutual Orientation in the Sign of Christ*, Tesi Gregoriani Serie Diritto Canonico 107, Rome, Editrice Pontificia Università, 2017, 489 p. — ISBN 978-88-7839-354-7.

This is a doctoral thesis that mainly addresses theoretical questions on the origin and nature of power in the Church and how ecclesiastical office relates to it. Although a canonical thesis, theological considerations play a dominant role. The central chapters of the work, following a solid first chapter on ecclesiastical office, centers on the question, much debated at Vatican II and in the doctrine thereafter, of whether all power in the Church comes from holy orders or whether, as traditionally held, there are the twofold powers of order and jurisdiction. The A. examines in detail the pertinent texts of Vatican II and of authors such as Bertrams, Correcco, and Ghirlanda. He takes a middle ground, holding that, "theologically, sacred power is nothing other than Christ's own power, namely the grace of the Holy Spirit that operates

in the nature of word and in the nature of sign" (263). At the same time, he accepts a twofold expression of that one sacred power, that of order and jurisdiction. While "the power of jurisdiction of bishops is of divine origin," he asserts that it is "transferred to them through the mediation of the Supreme Pontiff by canonical mission" (333).

There are some difficulties with the A.'s theory regarding the papal role in transferring to bishops the divine law power of jurisdiction by means of a canonical mission. It ought to be noted that the patriarchal synods of the Eastern Catholic Churches elect their bishops in synod and that, in the Latin Church, bishops were elected for most of its history without any intervention of the pope. The valid jurisdiction of the Orthodox bishops is likewise accepted by the Roman Church. Consequently, it seems better to say, not that the pope transfers jurisdiction to bishops by "canonical mission" but that the power of jurisdiction is attached to the office of diocesan bishop, no matter how the office is acquired, and bearing in mind that restrictions on the exercise of this power are possible in accord with the norm of law (cf. c. 381 §1).

Another problem is the very use of the expressions "canonical mission" and "sacred power" as central concepts in a theory of ecclesiastical power. The term *missio canonica* is not found at all in the 1983 Code and only appears once in the documents of Vatican II, in *Lumen gentium* 24 (and again in the *Nota explicativa praevia*). In *LG* 24 it refers to the selection of bishops by various means, not the conveyance of jurisdiction to bishops from the pope. Likewise, Vatican II used the novel concept *sacra potestas* only three times, twice in the context of the power of the priestly order (*LG* 10 and *PO* 2) and once concerning the divine law power of governance of diocesan bishops (*LG* 27). Clearly, neither deacons nor lay persons can participate in this sacred power, for it is the power of the priestly order and the *divine law* power of governance of the pope, the college of bishops, and the diocesan bishops who are the successors of Peter and the apostles. All other power of governance, however, is of the ecclesiastical law, so all the faithful are capable of exercising this power *ad normam iuris*.

A theory rooted in the contemporary law ought, rather, to have the three *munera* as its basis. The term *munus* was used hundreds of times at Vatican II and about 200 times in the Latin Code (although not always with respect to the threefold *munera*). All the faithful have a share in the threefold *munera* in virtue of their baptism, and the clergy have a distinctive participation in virtue of their ordination. All of the Church's activities (not just acts of the powers of order and governance) comprise these *munera*. For these activities to be exercised *nomine Ecclesiae*, however, there must be (apart from acts of the power of order) some juridical determination: the provision of an

office, the grant of a faculty by law or delegation, a permission, etc. This rule is true of all the *christifideles*, including bishops. The A. himself affirms this very well in his own words (e.g., on p. 336), but it gets muddled by the old idea that a bishop cannot exercise the *munera* without a canonical mission from the pope.

John M. HUELS

KALETA, Paweł, *Legal Aspects of the Management of Church Property*, Lublin, Wydawnictwo KUL, 2017, 204 p – ISBN 978-83-8061-403-1 – 40,00 zł

The Church claims its innate right to acquire, retain, administer, an alienate property, independently from civil power, in order to pursue its proper purposes (canon 1254 § 1). These proper purposes are primarily to order divine worship, to care for the decent support of clergy and other ministers, and to perform apostolic and charitable works, especially toward the needy (canon 1254 § 2). These four-fold aspects of the Church's innate right in relation to temporal goods are performed at all levels of ecclesial life.

In this monograph, Kaleta considers precisely the "administration" of ecclesiastical goods by dioceses, parishes, and religious institutes. He notes that "administration" is placed among the four-fold aspects between "retention" and "alienation" because administration intends to "increase in its efficiency" goods which have already been retained and which are not being alienated. While the focus of this work is on the "administration" of church property, the author also presents universal ecclesiastical discipline on the acquisition, retention, and alienation of the same.

The book is composed of five chapters. Chapter I concerns the concept and types of administration of ecclesiastical goods in the 1983 Code. The next three chapters address the administration of ecclesiastical goods in the diocese (Chapter II), the parish (Chapter III), and religious institutes (Chapter IV). Chapter V considers the supervisory authorities and representatives involved in administration, and also other acts which are related indirectly to administration (i.e., alienations and canon 1295 transactions).

Throughout this excellent contribution to a clear understanding of the administration of ecclesiastical goods, the author presents a detailed and thorough overview of countless canons related to the care of ecclesiastical goods in the Latin Church. He clearly and accurately explains canonical distinctions (e.g., between acts of ordinary administration and acts of extraordinary administration), canonical institutes related to caring for church

property (e.g., the diocesan and parish finance councils, the college of consultors, the presbyetral council), and applications of universal law within various juridic persons (e.g., dioceses, parishes, religious institutes/provinces/houses).

The author provides extensive footnotes throughout this work, which ends with an extensive multilingual bibliography which will assist the reader in conducting further research.

Though this work makes regular (and enlightening) references to the Church in Poland, it is a welcome addition to every library of church leaders and canonists who wish to expand and enrich their understanding of the legislation of the Latin Church governing the administration of ecclesiastical property. It can only be most highly recommended. Without doubt, all of us will welcome further canonical studies by Kaleta in the area of church property: we will grow in appreciation of his careful analyses, clear writing style, and thorough presentation.

John A. RENKEN

KAWA, Stanisław, Agnieszka ROMANKO, Mirosław SITARZ, and Anna SŁOWIKOWSKA (eds.), *The Enrollment to the Catholic Church*, Rome, Libreria Editrice Vaticana, 2017, 164 p. — ISBN 978-88-209-9993-3 — € 23.

If a predominant theme were to be chosen for the diverse essays of this volume, it would be the need for a reform of Church law to permit greater freedom in the choice and transfer of one's Church *sui iuris*. Indeed, some authors are highly critical of the current law, accusing it of creating "ritual slavery."

Stanisław KAWA of the St. Joseph Bilczewski Theological Institute of Lviv argues persuasively for greater liberty in changing one's ecclesial ascription in light of the right to religious freedom. In the *praxis Curiae romanae*, there must be a compelling justification for the permission to transfer to another Church *sui iuris*, but neither of the Codes specifies what these reasons might be. An archival investigation by the A. shows inconsistencies in the practice of the Oriental Congregation, sometimes permitting a transfer for a given reason while at other times denying it. The A. makes a strong case that the canonical restrictions on transfer of Church *sui iuris* are too severe, impractical, and contrary to the Church's own doctrine of religious freedom. Just as no one may be forced to embrace the Catholic faith against one's conscience (c. 748 § 2), so too should no one be forcibly ascribed to a given Church *sui iuris* against his will.

In an essay entitled "Ritual Enslavement," Józef PAWLICZEK, Vicar General of the Archdiocese of Lviv, presents several case studies in which the Congregation for the Eastern Churches refused permission to petitioners seeking to be enrolled in the Latin Church. He, too, takes the approach that this need for a permission of the Holy See is a violation of religious freedom. It puts institutional concerns of the Eastern Catholic Churches at higher value than the religious rights of individual persons.

Anna SŁOWIKOWSKA, of the John Paul II Catholic University of Lublin, authors the opening chapter which explores the legal meanings of the terms "affiliation," "ritual," "rite," the Polsish word *ryt*, and "tradition." There follows an essay on the criteria for ecclesiastical enrollment—notably baptism, faith, the sacraments and ecclesiastical governance—which is written by Mirosław SITARZ of the same university. Writing in Italian, Andriy TANASIYCHUK of the St. Piux X Faculty of Canon Law in Venice offers a primer on the laws of the two Codes governing enrollment to and transfer of Church *sui iuris*. Josef MARČIN of the Catholic University in Ruzomberok addresses some concerns of the Churches in post-war era Slovakia, in particular certain tensions between the Latin and the Eastern Churches, Catholic and Orthodox. Agnieszka ROMANKO, of the John Paul II Catholic University of Lublin, offers the concluding essay, which briefly presents the changes in the Latin Code on ecclesial ascription introduced by Pope Francis's 2016 motu proprio *De concordia inter Codices*.

All the essays in this volume are in English except the one in Italian. Although nearly all the authors are canonists and most are professors, the audience for the work is not principally academic. Indeed, much of the information in it would already be known to the canonist, so it is evident that the editors intend a wider audience for their work. This is in keeping with it stated purpose to address requests "made by priests to present questions of ritual affiliation and attempt to offer specific solutions which could be used in pastoral work" (p. 6).

John M. HUELS

OPONDO, Jacinta A., *Temporary Profession and Exclusion from Subsequent Profession (Cann. 655; 689): Theological-Juridical Study*, Tesi Gregoriana Serie Diritto Canonico 106, Rome, Editrice Pontificia Università Gregoriana, 2017, 448 p. – ISBN 978-88-7839-352-3 – € 22,00

This is a published doctoral thesis whose author, a religious of the Franciscan Sisters of St Anna (FSA), examines the phenomenon of temporary profession (c. 655) and the potential exclusion from subsequent profession

permitted by canon 689. Opondo begins by considering the origin of the concept of temporary profession in the simple vows of the Society of Jesus and examining its subsequent development and solidification in the Pio-Benedictine Code. Subsequent chapters consider the impact of Vatican II, current regulation in 1983 Code and Roman jurisprudence on exclusion from final profession. Finally, she draws conclusions from all of the above for best praxis in making decisions on admission to final vows, hierarchical recourse and approaching the Signatura.

The great strengths of this work are its extensive evaluation of the history, reviewing the development of temporary profession within the broad sweep of that of the vowed life in general, and its understanding of both current and historical canonical dispensations within the context of the theology of religious life. Opondo has clearly taken to heart Ladislas Örsy's demand that canon law be approached theologically. Accordingly, she puts great emphasis on the need for decisions on final profession to be based firmly on the discernment of a religious vocation in the candidate and to be grounded within the charism of the institute in question and the ability to live the charism in practice. Unfortunately, this focus on theology and the praxis of religious life leads to some tendentious statements (relating to such matters as the necessity for religious habits and the claim that more collegial models of decision-making emerging in the post Vatican II era have undermined the vow of obedience) which do little to advance her broad thesis. These are, however, minor quibbles which do not detract from the real, and major, achievement of this book—a lucid exposition of the phenomenon of temporary vows in its canonical and theological context by an author who obviously brings wide learning to her task.

The serious weakness of the work, however, is the failure to integrate the Code's general norms on administrative decision-making into this understanding—especially when it comes to the treatment of canon 689 and exclusion from permanent profession. Opondo treats as "temporary vows" both vows permanent *ex parte voventis* but not on the part of the institute (such as still exist, for instance, in the Jesuits) and vows for a set time-period. She does so on the basis that the former are terminable on the part of the institute and therefore subject to a condition. While this is correct historically, in that the latter arose from the former, it is unfortunate that she does not explicitly consider the practical canonical consequences of the difference between them—a temporary vow creates no necessary expectation of renewal (on either party) once the time has elapsed while a vow permanent *ex parte voventis* must be terminated by the deliberate act of a superior (which accordingly requires cause).

Similarly, Opondo's broader statement (p. 242) that "exclusion does not require any particular formalities, nor any specific procedures" is undermined not only by canon 689 itself (which demands expert consultation where the exclusion is on the grounds of illness or incapacity) but also by the general administrative procedure (as Daniels calls it) in canons 50 and 51 and the requirement (for validity) of consultation of the superior's council in canons 127 and 689 (a requirement which she does, however, acknowledge).

Unfortunately, this difficulty recurs throughout Opondo's treatment of the exclusion procedure. Her rationale for the issue of reasons for the decisions in canon 51, for example, is that only in this way can the member participate meaningfully in the decision (pp. 279-80, 302). Canon law, however, demands meaningful input by an affected party *before* a decision is taken (c. 50). Hearing the affected party is administrative activity (as Huels calls it) which is required in order to lay the basis for just decision-making rather than an *ex post facto* rationalisation or an attempt to forestall a decision which has already been taken. Similarly, Opondo opines that the hierarchical superior cannot assess the legitimacy of a decision on internal recourse because the inferior who has knowledge of the member concerned represents the institute and is in a better condition to assess the member's vocation (pp. 341-343). While the superior may be at one remove, he or she clearly also represents the institute and there is nothing which prevents him or her assessing the adequacy of the inferior's decision on the basis of the reasons given. Indeed, he or she is obliged by the general administrative procedure to do so.

In conclusion, this work marks a genuine contribution to the understanding of temporary vows in their theological and historical context and is a worthy addition to a canonist's bookshelf. For best effect, however, it should be balanced with a work on general norms of law relating to administrative decisions.

Justin E.A. GLYN, S.J.

Auteurs des recensions de cette livraison — Reviewers for this issue

Justin E. A. GLYN, S.J. is a member of the Australian Province of the Society of Jesus (Jesuits), who has recently completed the Master of Canon Law/JCL at the Faculty of Canon Law, St Paul University, Ottawa, Canada.

John M. HUELS is full professor of the Faculty of Canon Law, Saint Paul University, Ottawa, Ontario, Canada.

Dominique LE TOURNEAU est membre de la prélature de la Sainte-Croix et *Opus Dei*, Paris, France.

John A. RENKEN is full professor and dean of the Faculty of Canon Law, Saint Paul University, Ottawa, Ontario, Canada.

Studia canonica 52 | 2018, 271
doi: 10.2143/STC.52.1.3285221

OUVRAGES REÇUS À LA RÉDACTION — BOOKS RECEIVED

ARAKKAL, Kurian, *Conferences and Synods in the Indian Church*, Kanonistische Reihe, Band 029, Sankt Ottilien, EOS Verlag, 2018, xix, 355 p. – ISBN 978-3-8306-7901-1 – € 29,95

FLORES CALDAS, Edgar C., *Libertad religiosa y enseñanza de la religión católica en el ordenamiento jurídico peruano y en el acuerdo con la Santa Sede de 1980*, Dissertationes canonicae 8, Madrid, Ediciones Universidad San Dámaso, 2018, xii, 577 p. – ISBN 978-84-16639-71-7 – € 30,00

GILLESPIE, Kevin, *Ecclesiastical Office and the Participation of the Lay Faithful in the Exercise of Sacred Power: Towards a Theological and Canonica Understanding of the Mutual Orientation in the Sign of Christ*, Tesi Gregoriana Serie Diritto Canonico 107, Rome, Editrice Pontificia Università Gregoriana, 2017 – ISBN 978-88-7839-354-7 – € 24,00

HECKEL, Noach, *Das Allgemeine Dekret der Deutschen Bischofskonferenz zum Kirchenaustritt vom 15 März 2011: Der Kirchenaustritt in Deutschland aus der Sicht des katholischen Kirchenrechs*, Kanonistische Abteilung, Band 75, Sankt Ottilien, EOS Verlag, 2018, xxx, 642 p. – ISBN 978-3-8306-7884-7 – € 49,95

KALETA, Paweł, *Legal Aspects of the Management of Church Property*, Lublin, Wydawnictwo KUL, 2017, 204 p – ISBN 978-83-8061-403-1 – 40,00 zł

OPONDO, Jacinta Auma, FSA, *Temporary Profession and Exclusion from Subsequent Profession (Cann. 655; 689): Theological-Juridical Study*, Tesi Gregoriana Serie Diritto Canonico 106, Rome, Editrice Pontificia Università Gregoriana, 2017 – ISBN 978-88-7839-352-3 – € 22,00

Studia canonica 52 | 2018, 273-276
doi: 10.2143/STC.52.1.3285222

NOTES BIOGRAPHIQUES
BIOGRAPHICAL NOTES

BAUER, Nancy, O.S.B.

Sister Nancy Bauer, O.S.B., is a member of the Sisters of the Order of Saint Benedict of Saint Benedict's Monastery, St. Joseph, Minnesota. She earned the licentiate and doctorate in canon law at The Catholic University of America in Washington, DC. She is currently an assistant professor in the School of Canon Law at The Catholic University of America.

FOSTER, John J. M.

Monsignor John J. M. Foster was born in Escalon, California in 1964 and ordained to the priesthood for the Diocese of Stockton on 29 June 1991. He has degrees from Georgetown University (A.B., 1986), St. Patrick's Seminary (M.Div. and M.A. in Theology, 1991), and the Catholic University of America (J.C.L., 1996; J.C.D., 2007). He served as the Director of the Office for Worship (1999–2005) and Judicial Vicar (2000–2007) of the Diocese of Stockton. Prior to his current appointment as Vicar General and Moderator of the Curia for the Archdiocese for the Military Services, USA in 2013, he was Assistant Professor of Canon Law at The Catholic University of America (2007–2013), where he taught and wrote in the areas of sacramental and liturgical law. He serves as President of the Canon Law Society of America 2017–2018.

GLYN, Justin, S.J.

Father Justin Glyn, S.J. was born in Windhoek in Namibia in 1972. He obtained BA (1992) and LLB (1995) degrees from the University of South Africa and practised as an attorney in South Africa from 1997-98 and as a barrister and solicitor in New Zealand from 1999-2008, obtaining a Ph.D. in law (administrative law and international law relating to refugees) from the University of Auckland in 2008. He entered the Society of Jesus in 2009 and, after obtaining B.Theol. (Hons) (2012) and Master of Theological Studies (2016) from the University of Divinity (Melbourne) was ordained priest in 2016. He completed a Masters in Canon Law/ JCL at Saint Paul University

in 2018. Previous publications include: Fundamental Rights in Administrative Decision-Making: Peremptory Norms as Objective Standards in Immigration and Refugee Cases, Adelaide, Presidian, 2009. "Justice: An Ignatian Perspective," The Way 51 (2012), 55-64; "Revelation and Love," Pacifica 28 (2015) 176-191; "'Pied Beauty': The Theological Anthropology of Impairment and Disability in Recent Catholic Theology in the Light of Vatican II," Heythrop Journal March (2016).

LE TOURNEAU, Dominique

Monseigneur Dominique Le Tourneau est né à Paris, le 1er mai 1942. Ordonné prêtre le 4 août 1974, incardiné dans la Prélature de la Sainte-Croix et Opus Dei. Chapelain de Sa Sainteté. Docteur en Droit canonique (Université de Navarre). Il est juge ecclésiastique, professeur au Studium de droit canonique de Lyon, professeur visitant à l'Université de Navarre, écrivain et poète. Il a publié récemment, entre autres, un Manuel de droit canonique, un manuel sur Les droits et les devoirs fondamentaux des fidèles et des laïcs dans l'Église, et un Dictionnaire encyclopédique de Jeanne d'Arc (en collaboration avec P.-A. Ambrogi).

LUSABE, Lennoxie N., C.M.

Father Lennoxie Lusabe, C.M., was born in Bungoma, Kenya, in 1973 and ordained to the priesthood for the Congregation of the Mission of St. Vincent de Paul in 2005. A Diploma in Philosophy and Religious Studies (Christ the King Major Seminary, Nyeri, Kenya,1995), a Baccalaureate in Theology (Catholic University of Eastern Africa, Nairobi, Kenya, 2003), a Masters in Christian Ethics (Catholic Theological Union, Chicago, Illinois, USA, 2005), a Masters in Canon Law (University of Ottawa, Canada, 2011), a Licentiate in Canon Law (St. Paul University, Ottawa, Canada. 2012), a Diploma in Law, Paralegal Studies (Kenya School of Law, Nairobi, Kenya, 2015), a Certificate in Conflict Resolution (Canadian Institute of Conflict Resolution, Ottawa, Canada, 2016) a Ph.D. in Canon Law (University of Ottawa, Canada, 2017), and a J.C.D in canon law from St. Paul University, Ottawa, Canada, 2017). He is currently a lecturer of canon law and the head of department of canon law at Tangaza University College, Nairobi, Kenya.

PETIT, Emmanuel

Abbé Emmanuel Petit est prêtre de l'archidiocèse de Paris depuis 2002. Il est diplômé de l'Institut d'Études Politiques de Paris en 1994. Il est licencié en droit canonique de la faculté de droit canonique de Paris en 2003. En 2006,

il continue sa formation à l'Université Grégorienne, à Rome, où il suit l'année de jurisprudence. Dans le même temps, il prépare une thèse en doctorat, sous la direction du Professeur Janusz Kowal. La thèse est soutenue en juin 2009 sous le titre : « Consentement matrimonial et fiction du droit. Étude sur l'efficacité juridique du consentement après l'introduction de la fiction en droit canonique ». La thèse est publiée à Rome, en 2010, dans la collection « Tesi gregoriana ». Depuis son retour à Paris, il enseigne le droit canonique à la faculté de théologie des Bernardins et, depuis 2011, à la faculté de droit canonique de Paris (Institut Catholique de Paris) où il est en charge du cours de droit matrimonial. Dans le même temps, il travaille au Tribunal ecclésiastique de Paris, dans la fonction de vice-official depuis 2010.

PHAM, Bryan, S.J.

Father Brian Pham, S.J., is a Catholic priest based in Los Angeles, California. He is the author serves on the faculty of the Theological Studies Department and collaborates with the Education Law Services at Loyola Marymount University. At Loyola Law School at LMU, the author is the Catholic Chaplain and practices immigration/asylum law at the Loyola Immigrant Justice Legal Clinic. Additionally, the author serves as a Judge and a Defender of the Bond with the Metropolitan Tribunal of the Roman Catholic Archdiocese of Los Angeles. An active member of the Washington State Bar Association and the Kalispell Tribe of Indians Tribal Court, the author received a B.A. from Gonzaga University, a J.D. from Seattle University School of Law, an STB/M.Div. from Regis College and the University of Toronto, a J.C.L. from the Pontifical Gregorian University, and a J.C.D/Ph.D. from Saint Paul University and the University of Ottawa.

RENKEN, John A.

Monsignor John A. Renken, P.H., was born in Carlinville, Illinois on 18 January 1953. He holds a B.A. in Philosophy (Cardinal Glennon College, Saint Louis, 1975); M.A. in Civil Law (University of Illinois, Springfield, 1988); S.T.D. in Dogmatic Theology (Pontifical University of Saint Thomas Aquinas, Rome) and J.C.D. (Pontifical University of Saint Thomas Aquinas, Rome, 1981). He was ordained a priest by Saint John Paul II on 24 June 1979. He served in multiple positions in the Diocese of Springfield in Illinois: parochial vicar, co-pastor, priest-moderator, vice-chancellor, chancellor, episcopal vicar and moderator for canonical affairs, vicar general, moderator of the curia, judicial vicar, director of the permanent diaconate. He was president of the CLSA (1999-2000); chair of the committee for the 1999

CLSA translation of the CIC; advisor to the USCCB Committee on Canonical Affairs (2003-2005); visiting professor of canon law in the summer JCL program at The Catholic University of America (1989-2006). He has lectured widely and his articles appear in many canonical journals. In 2007, he joined the Faculty of Canon Law, Saint Paul University, Ottawa, where he is now Dean and full professor.